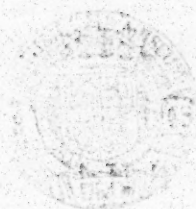


A
R E P O R T
O F
SOME PROCEEDINGS
O N T H E
COMMISSION OF OYER AND TERMINER
AND GOAL DELIVERY
F O R T H E
T R I A L O F T H E R E B E L S I N T H E Y E A R
1746
I N T H E
C O U N T Y O F S U R R Y,
A N D O F O T H E R
C R O W N C A S E S.
T O W H I C H A R E A D D E D
D I S C O U R S E S U P O N A F E W B R A N C H E S
O F T H E
C R O W N L A W.

D U B L I N :

Printed for SARAH COTTER, in *Skinner-Row*,
M. DCC. LXIII.

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T H E

P R E F A C E.

I NOW submit to publick Censure a Report of a few Crown Cases which for the most Part have fallen within my own Observation, and in which I have taken some Share. What other Notes I have taken meerly for my own use, are too crude and imperfect to admit of a Publication ; and as I have neither leisure nor inclination to revise them, they will never see the Light.

I have in this Report taken a larger Scope, and entered more fully into the State of many of the Cases and the Reasoning on them, than most of my Cotemporaries have done ; and this hath drawn me into a greater Length than they have allowed to themselves. Brevity I have endeavoured to consult as far as my Subject will admit of it. But the Affectation of Brevity at the Expence of Perspicuity can answer no valuable Purpose.

LEARNED Men who have employed their Time in transmitting to Posterity with Accuracy, Precision and true Judgment, an History of Cases of

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Weight

THE PREFACE.

Weight and Difficulty falling within their own Experience, have been real Benefactors to the Publick; and their Memory is and ever will be treated with due Esteem. But many of the hasty indigested Things called *Reports of adjudged Cases*, not deserving the Name of tolerable *Abridgments*, stuffed as they frequently are with the *Obiter Opinions* of Judges upon the *Breaking* of a Case, which probably never proceeded beyond one slight Argument, these Things and others of the like Kind, meer Fragments of Learning, the Rummage of dead Men's Papers, or the first Essays of young Authors, have been the Bane and Scandal of the Law considered as a Science *founded on Principle*. They burden the Memory, or possibly may swell the Common-Place; but not entering with due Precision into the Merits of the Question, they leave the Judgment uninformed, and furnish Materials for endless Altercation. They are, if I may be allowed the Expression, the *Ignes Fatui* of the Profession, they always bewilder the Reader and frequently mislead him.

I have in a few Instances taken the Liberty of subjoining to the Report of the Case some Observations of my own by Way of Proof or Illustration, and sometimes of Censure. I make no Apology for this Freedom. I wish the ablest of our Reporters had more frequently taken the same.

In reporting the Arguments of Council or the Opinion of the Judges, I have not scrupulously followed the Style and Method of the Speaker. I hope however the Reader will do me the Justice to believe, that the Substance of what was delivered

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vered is faithfully reported, but for the most Part in my own Words. Every Defect therefore in Point of Method or Expression which the Reader will meet with, I alone am answerable for. Though I flatter myself the learned Gentlemen whose Sentiments I have delivered in my own Stile and Method, will not often find themselves or their Characters greatly wronged in that Respect.

THE Discourses which follow the Report were for the most Part written some Years ago at different Times ; as Leisure served or Inclination led me in the Choice of my Subject.

I never intended to travel through a regular System of the Crown-Law. It is a Journey not to be undertaken by any Man in a publick Employ, and already far advanced in Years. I am therefore content to make myself accountable for a few plain Discourses upon some of the more interesting Branches of that Part of the Law, and of the most general Concernment. I mean such Parts of the Statute of Treasons which I have considered, many I have purposely omitted, and the Doctrine of Homicide in all it's Branches.

IF what I have offered upon these Subjects may serve to remind Gentlemen of Rank and Character in the Profession, of what their own Reading and Experience may have suggested ; and at the same Time to lead young Gentlemen into a right Method of arranging their Ideas, and reducing what they read or hear to the well-known Principles of Law and sound Policy, my End as far as regards the Profession will be answered.

BUT

BUT I confess my Views were carried something further.

THE Learning touching these Subjects is a Matter of great and universal Concernment. It merits, for Reasons too obvious to be enlarged on, the Attention of every Man living. For no Rank, no Elevation in Life, and let me add, no Conduct how circumspect soever, ought to tempt a reasonable Man to conclude that these Inquiries do not, nor possibly can, concern him. A Moment's cool Reflection on the utter Instability of human Affairs, and the numberless unforeseen Events which a Day may bring forth, will be sufficient to guard any Man conscious of his own Infirmities, against a Delusion of this Kind. Those therefore whose Birth or Fortunes have happily placed them above the Study of the Law *as a Profession*, will not be offended if I presume that Discourses on these Subjects, in Preference to every other Branch of the Law, demand *their* Attention.

I have in the Prosecution of these Subjects endeavoured rather to ground myself upon Principles of Law and sound Policy than on the bare Authority of former Writers; who will frequently be found contradicting each other, *and sometimes themselves*.

I have endeavoured likewise to clear up a few Points which have long lain under some Obscurity. And where I differ from Authors whose Merit I acknowledge, and whose Memory I highly value, I always do it with Diffidence; and never without offering my Reasons, which are submitted to the Judgment of the Learned.

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THE MSS. cited in the following Papers, I am satisfied are genuine. Copies of them are in many Hands. And I doubt not the Citations will appear to have been faithfully made. If the Freedom I have taken with them needeth any Apology, they have been of considerable Service to me; they have given me Light upon many Points, which the printed Reports do not afford; and they are the Remains of Gentlemen eminent in the Profession. For these Reasons I was unwilling they should be wholly lost to the Publick.

IF Chief Justice *Hale's* Health or Leisure in the Decline of his Years had permitted him to revise his History of the Pleas of the Crown, and to render it as correct as his great Abilities would have enabled him; or perhaps had that valuable Work been published as correctly as he left it, I mean from the Transcript corrected and improved in great Measure with his own Hand, (the whole probably under his Direction, certainly found among his Papers after his Death); in either of these Cases every Attempt of this Kind might have been judged altogether needless.

BUT the corrected Copy, which, the Editor tells us, was bound up *in seven small Folio Volumes*, was TOTALLY laid aside, and the Work published from what he calls the Author's Original MS. comprized *in one thick Folio Volume*; in other Words from his *foul Draught*. The Reasons *given* by the Editor for this Procedure are too weak to merit a serious Answer. An Answer however is ready if it be thought necessary.

See the Editor's Preface.

A T

See Burnet's
Life of Hale.

AT the Time of the learned Author's Death when Matters were fresh in Memory, and when the Persons best acquainted with his MSS. were living, the Transcript was certainly considered as the genuine MS. Bishop *Burnet*, who doubtless had his Information from those who best knew, hath placed *the seven Volumes* in a Catalogue of the Author's MSS. published very soon after his Death, without the least mention of *the thick Folio Volume*. Which having been transcribed, and the Transcript corrected, was probably laid aside: as foul Draughts after Transcription commonly are, unless they are destroyed, which perhaps may be the better Way. For an Author must have less Sensibility under publick Censure than wise and good Men generally have, who can be content "to be sent to his Account with all " his Imperfections on his Head."

I hope these short Observations on the unkind Treatment the learned Judge hath met with from his Publisher may serve as my own Apology for the present Publication.

I intend it likewise as some Apology for that truly valuable Man. For if the Reader hath observed any Mistakes, Inconsistencies or needless Repetitions in the *Summary* or *History*, he will do the learned Author the Justice to remember, that in the Outlines of a Work of such Extent and Variety some Inaccuracies of this Kind are almost unavoidable. These common Candour will excuse, since the Author's *last Thoughts upon the Subject have been* SUPPRESSED. And one may venture to say for him, now he cannot speak for himself, that the *Summary*, a Collection of Extracts hastily put together at different Times, and in the
Hurry

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Hurry of a publick Employ; meer Hints for private Use, though thrown into some Method, and for the most Part placed under proper Heads, (as his Collections upon every Subject generally were,) was never intended for the Press nor fitted for it: and that the History itself was not intended by *him* for publick View in the Dress in which it now appeareth.

THE Observations on certain Passages in Lord Chief Justice *Hale's* Works have long lain by me, and possibly in the Opinion of some of my Readers come out somewhat unseasonably at this Juncture. The Cause of the Pretender seems now to be absolutely given up. I hope in God it is so. But whether the Root of Bitterness, the Principles which gave Birth and Growth and Strength to it, and have been twice within our Memory made a Pretence for Rebellion at Seasons very critical, whether those Principles be totally eradicated I know not. These I encounter in that Discourse by shewing that certain historical Facts which the learned Judge hath appealed to in support of them, either have no Foundation in Truth; or were they true do not warrant the Conclusions drawn from them.

THE Passages I animadvert upon have been cited with an uncommon Degree of Triumph, by those who, to say no worse of them, from the Dictates of a misguided Conscience, have treated the Revolution and present Establishment as founded in Usurpation and Rebellion; and they are in every Student's Hand. Why therefore may not a good Subject, be it in Season or out of Season, caution the younger Part of the Profession against the Prejudices which the Name of Lord Chief Jus-

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tice *Hale*, a Name ever honoured and esteemed, may otherwise beget in them? I for my Part make no Apology for the Freedom I have taken with the Sentiments of an Author, whose Memory I can love and honour without adopting any of his Mistakes upon the Subject of Government.

It cannot be denied, and I see no Reason for making a Secret of it, that the learned Judge hath in his Writings paid no Regard to the Principles upon which the Revolution and present happy Establishment are founded. The prevailing Opinions of the Times in which he received his first Impressions might mislead him. And it is not to be wondered at, if the detestable Use the Parliament Army made of it's Success in the Civil War did contribute to fix him in the Prejudices of his early Days. For in the Competition of Parties Extremes on one Side almost universally produce their Contraries on the other. And even honest Minds are not always secured against the Contagion of party Prejudice.

BUT it matters not with us, whether his Opinion was the Effect of Prejudices early entertained or the Result of cool Reflection: since the Opinion of no Man, how great or good soever, is or ought to be the sole Standard of Truth. He was undoubtedly very great in his Profession; and, which raiseth even a great Character infinitely higher in Point of real Merit and just Esteem, he was in every Relation of Life *a good Man*. Though the Rectitude of his Intentions, while under the strong Bias of early Prejudices, might sometimes betray him into great Mistakes.*

* See the Trial of the Witches at St. *Edmonds-Bury* before him in *March* 1664.

I hope

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XI

I hope therefore the young Gentlemen of the same honourable Profession, for whose Service these Observations are principally intended, will take the Writings of the learned Judge into their Hands, not barely with a just Opinion of his great Merit, but with an honest Resolution to exemplify in their own Conduct the valuable Parts of his Character.

AND I flatter myself that the Leisure of a long Vacation will not be thought to have been utterly mispent in revising and compleating that Discourse. It may at least serve to guard young and unexperienced Minds against some Impressions, which a modest Deference to the Opinion of so great an Author may have made upon them.

Serjeant's-Inn
Feb. 27, 1762.

M. FOSTER.

N. B. *In citing the State Trials I make Use of the Edition of 1730 for the 6 first Volumes, and that of 1735 for the 7th and 8th.*

John Adams
President of the United States
1735-1826
By John Q. Adams
Son of John Adams
President of the United States
1795-1801
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Published by
The Atlantic Monthly Press
7 North Second Street
New York
1901

THE LIFE OF
JOHN ADAMS
BY JOHN Q. ADAMS

VACATION

AFTER

TRINITY TERM, 1746.

DURING the Rebellion which began in *Scotland*, in the Summer 1745, an Act passed, empowering his Majesty to issue Commissions for Trying the Rebels in any County of the Kingdom, in the same Manner as if the Treasons had been committed in that County. ^{19 Geo. II. c. 9.}

PURSUANT to this Act, a * Commission of Oyer and Terminer, and Goal Delivery, for the County of *Surry*, passed the Great Seal about the latter End of *Trinity* Term. It was directed to every Privy Councillor by Name, to all the Judges, and to some private Gentlemen, empowering them or any three of them, (*Quorum un' &c.*) to execute the Commission.

THE Precept was signed by the three Chiefs and the three senior Judges, and was returnable the 23^d Day of *June* 1746; which made fifteen Days exclusive between the Teste and Return.

THIS was ordered on great Deliberation and Search of Precedents.

ON that Day most of the Judges met at *Serjeants-Inn*; and from thence proceeded in Order of Seniority to the Court House at *Saint Margaret's Hill* in the Borough of *Southwark*.

LORD Chief Justice *Lee* gave the Charge. And the Grand-Jury found Bills against the Earls of *Kilmarnock* and *Cromartie*, and the Lord *Balmerino*; which Bills were soon afterwards removed by *Certiorari* into Parliament.

ON the two following Days Bills of Indictment were found against thirty-six of the principal Rebels taken at *Carlisle*; and against one *David Morgan*, a Barrister at Law, who was taken at *Staffordshire*.

THE Prisoners were then brought to the Bar and informed that Bills were found against them, of which they should soon have Copies: And the Court adjourned to that Day se'nnight: And Copies of the Indictments with the

* Another Commission of the like Kind issued at the same Time for *Middlesex*; but there were no Proceedings on it.

THE REPORT.

Caption were delivered the same Day to the Prisoners after the Court rose.

By this Measure, the Prisoners had Copies of their Indictments five Days before their Arraignment, exclusive of that Day and of the Days Copies were delivered, and also exclusive of the Intervening *Sunday*. This was done *Ex majori Cautelâ* and in favour of Life, *Sunday* not being a Day on which the Prisoners may be presumed to be advising with Council and preparing for their Defence. It was so done upon the Commission which sat the same Summer in the North ; and had been done upon a like Commission in the North after the Rebellion of 1715. But the Statute doth not require this Caution with Regard to *Sunday*, nor is it of absolute Necessity ; though in Cases of Life it is best to follow Precedents, if the Time will allow of it.

July 3d.

UPON the Adjournment Day the Prisoners were severally arraigned, three pleaded Guilty. The rest pleaded Not Guilty. And each of them produced an Affidavit, towchich they were sworn in Court, setting forth that a material Witness or Witnesses (naming the Witnesses and the Places of their Abode) would be wanting for their Defence. And their Council, who had before been assigned them, moved that their Tryals might be put off for a reasonable Time for bringing up their Witnesses.

• Sir Dudley
Ryder.

THE Attorney General prayed Time to consider of the Motion and thereupon the Court adjourned to the next Day.

IN the Evening all the Judges in Town met at Lord Chief Justice Lee's Chambers, and agreed that the Case of these Prisoners differs greatly from the Common Cases of Tryals in the Circuits, where Affidavits of this Kind ought *very sparingly* to be admitted. For in Circuit Tryals the Prisoners from the Time of their Commitment may, and ought to be preparing for their Defence. The Place where they are to be tryed is in most Cases well known, and they have likewise a reasonable Certainty of the Time long before the Circuits begin.

BUT in the present Case the Prisoners are to be tryed at a great Distance from the Places where the Treasons were committed. And neither Time or Place for their Tryal can be said to have been certainly fixed 'till Bills of Indictment were found against them, and Copies delivered to them ;
from

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from which Time it was incumbent on them to be preparing for their Defence and getting their Witnesses to Town.

AND in Regard that the Affidavits mentioned the Witnesses to reside at different Distances from Town, some in *England*, and others in *Scotland*, it was thought reasonable that in fixing the Times of Tryal, regard should be had to the several Distances.

ACCORDINGLY it was agreed that with Regard to those Prisoners whose Witnesses reside in *England*, their Tryals should be * put off to the 15th of *July*; and that the Court would from thence proceed *de Die in Diem* till those Tryals should be dispatched. And with Regard to those whose Witnesses reside in *Scotland*, their Tryals should be put off to the 25th. And on the next Day the Court ordered accordingly and adjourned to the 15th of *July*.

N. B. THE ACT of the 19th Geo. 2. c. 1. directing that no Judge shall during the Time therein mentioned, try or bail any Prisoner committed for High Treason without a Warrant signed by six of the Privy Council, it was thought proper, *Ex majori Cautela*, to have such Warrant directing the Commissioners to proceed to the Tryal of those Prisoners. And such Warrant was procured before the Tryals came on.

THE like Caution had been before used with Regard to the Tryal of *Christopher Layer*, while a like ACT was in Force.

THE Indictment and Caption made Use of on this Occasion were as follows.

Surry. BE IT REMEMBERED, *That at a Special Session of Oyer and Terminer, and Goal-Delivery of our Sovereign Lord the King, of and for the County of Surry, holden at the Borough of Southwark in the said County, on Monday the twenty third Day of June in the Twentieth Year of the Reign of our said present Sovereign Lord GEORGE the Second by the Grace of God of Great-Britain, France, and Ireland, King, Defender of the Faith and so forth, before Sir William Lee Knight Chief Justice of our said present Sovereign Lord the King appointed to hold Pleas before the King himself, Sir John Willes Knight &c.*

* Upon the like Commissions in *Middlesex* and *Surry* A^o 1716, the Prisoners had three Weeks from their Arraignment.

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[Naming the rest of the Judges and Commissioners present] *and others their Fellows Justices and Commissioners of our said present Sovereign Lord the King, assigned by Letters Patent of our said present Sovereign Lord the King under his Great Seal of Great Britain, made by Virtue of the Statute made in this present Parliament, intituled, An Act for the more easy and speedy Tryal of such Persons as have levied or shall levy War against his Majesty, and for the better ascertaining the Qualifications of Jurors in Tryals for High Treason, or Misprision of Treason in that Part of Great Britain called Scotland, to the said Justices and Commissioners above-named and others, and to any three or more of them (of whom our said present Sovereign Lord the King willed that any of them the said Sir William Lee, [Naming some others of the Judges] and others in the same Letters Patent named and appointed shall be one) to deliver the Goal of the said County of the Prisoners therein being, or such as shall or may be detained in the same, on or before the first Day of January in the Year of our Lord One Thousand Seven Hundred and Forty six, for or on Account of the High Treason mentioned in the said Statute in levying War against our said present Sovereign Lord the King within this Realm, and to enquire by the Oath of good and lawful Men of the same County of all such High Treasons in levying War against our said present Sovereign Lord the King within this Realm by the said Prisoners or any of them, or by any other Person or Persons who are now in actual Custody for or on Account of the same, or who are or shall be guilty of High Treason in levying War against our said present Sovereign Lord the King within this Realm, and shall be Apprehended and Imprisoned for the same on or before the said first Day of January in the said Year of our Lord One Thousand Seven Hundred and Forty Six, and the same High Treasons to hear and determine according to the Form of the said Statute by the Oath of Sir William Richardson of Bermondsey Knight, Sir Abraham Shard of Knight &c. [Naming the Grand Jurors] good and lawful Men of the said County, being then and there sworn and charged to inquire for our said present Sovereign Lord the King touching and concerning the Premises in the said Letters Patent mentioned, It is presented, That the Bill of Indictment to this Schedule annexed is a true Bill.*

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THE JURORS for our present Sovereign Lord the King upon their Oath present, That John Hamilton late of the City of Carlisle in the County of Cumberland Esquire, otherwise called John Hamilton late of the same Place Gentleman, Alexander Abernethy late of the same Place Gentleman, otherwise called Alexander Abernethy late of the same Place Surgeon, and George Abernethy late of the same Place Gentleman, being Subjects of our said present most Serene Sovereign Lord GEORGE the Second by the Grace of God of Great Britain, France, and Ireland, King Defender of the Faith and so forth, not having the Fear of God in their Hearts, nor having any Regard for the Duty of their Allegiance, but being moved and seduced by the Instigation of the Devil, as false Traitors and Rebels against our said present Sovereign Lord the King, their Supreme true natural lawful and undoubted Sovereign Lord, entirely withdrawing that cordial Love, and that true and due Obedience, Fidelity and Allegiance, which every Subject of our said present Sovereign Lord the King, should and of Right ought to bear towards our said present Sovereign Lord the King; And also devising and (as much as in them lay) most wickedly and traiterously intending to change and subvert the Rule and Government of this Kingdom duly and happily established under our said present Sovereign Lord the King, and also to depose and deprive our said present Sovereign Lord the King of his Title, Honour and Royal State, and of his Imperial Rule and Government of this Kingdom, and also to put and bring our said present Sovereign Lord the King to Death and final Destruction, and to raise and exalt the Person pretended to be Prince of Wales, during the Life of James the Second late King of England and so forth, and since the Decease of the said late King, pretending to be, and taking upon himself the Stile and Title of King of England by the Name of James the Third, to the Crown and to the Royal State and Dignity of King, and to the Imperial Rule and Government of this Kingdom, upon the tenth Day of October in the nineteenth Year of the Reign of our said present Sovereign Lord the King at the City of Carlisle aforesaid, in the County of Cumberland aforesaid, with a great Multitude of Traitors and Rebels against our said present Sovereign Lord the King (to wit) to the Number of Three Thousand Persons (whose Names are as yet unknown to the

said Furors) being armed and arrayed in a Warlike and Hostile Manner (to wit) with Colours displayed, Drums beating, Pipes playing, and with Swords, Clubs, Guns, Pistols, and divers other Weapons as well offensive as defensive, with Force and Arms did falsely and traiterously assemble and join themselves against our said present Sovereign Lord the King, and then and there with Force and Arms did falsely and traiterously, and in a Warlike and Hostile Manner array and dispose themselves against our said present Sovereign Lord the King, and then and there with Force and Arms, in Pursuance and Execution of such their wicked traiterous Intentions and Purposes aforesaid, did falsely and traiterously prepare, order, wage and levy a publick and cruel War against our said present Sovereign Lord the King, then and there committing and perpetrating a miserable and cruel Slaughter of and amongst the faithful Subjects of our said present Sovereign Lord the King, and also then and there during the said War with Force and Arms did with the said Traitors and Rebels so assembled, armed and arrayed as aforesaid, falsely and traiterously against the Will of our said present Sovereign Lord the King, enter into and take Possession of the said City of Carlisle and the Castle thereto belonging within the same City, (the said City and Castle being a City and Castle of our said present Sovereign Lord the King) and the said City and Castle with Force and Arms then and there did falsely and traiterously possess, hold, keep, maintain and defend, against our said present Sovereign Lord the King, against the Duty of their Allegiance, against the Peace of our said present Sovereign Lord the King, his Crown and Dignity, and also against the Form of the Statute in such Case made and provided.

N. B. THIS Indictment and Caption were made use of against all the Rebels who were tryed in Surry, except *Aeneas Macdonald*; save that the Overt Acts were laid in different Counties of *England* or *Scotland*, as the Cases respectively required; And also save that the Overt Act of taking and possessing the City and Castle of *Carlisle* was not charged on those who were not concerned in that Part of the Rebellion.

THE Indictment against *Aeneas Macdonald* was in the same Form, but concluding as follows. *He the said Aeneas Macdonald,*

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Mackdonald, otherwise called Angus Mackdonald, having been Apprehended and Imprisoned for the High Treason above mentioned, before the first Day of January in the Year of our Lord One Thousand Seven Hundred and Forty six.

THE Reason of this Averment will be mentioned in its proper Place.

Mr. TOWNLEY's Case, July 15. 1746.

HIS Council moved that before any Juryman should be brought to the Book, the whole Pannel might be called over once in the Prisoner's hearing, that he might take notice who did and who did not appear : which they said would be a considerable Help to him in taking his Challenges. * This was done by Order of the Court, and the Attorney General did not oppose it.

EVERY Juryman as he came to the Book was asked whether he was a Freeholder or no. Those who answered that they had no Freehold in the County, were examined upon a *Voire dire* to that Matter : and on their answering that they had no Freehold, were set aside. Those who answered that they had both Freehold and Copyhold were asked whether both put together did amount to £ 10 a Year ; and if they did, that was admitted to be a good Qualification, though the Freehold alone was under £ 10.

The Court grounded this Rule on the Bill of Rights and the 4th and 5th W. M. compared.

1. W. M. St.

2. c. 2.

THE Prisoner's Council offered to call a Witness to shew that he was at the Time of the Rebellion in the Service and Pay of the *French King*, and so intituled as they insisted, to the Benefit of this Cartel for Exchange of Prisoners : But the Court declared that such Proof is not to be admitted. It is no Defence in a Court of Law, nor is it so much as an Excuse, that he had entered into the Service of an open Enemy. See the Case of *Æneas Mackdonald*.

4. 5. W. M.

c. 24. S. 15.

THEY then insisted on what they (very improperly) called the Capitulation at the Surrender of *Carlisle*. In this likewise the Court over-ruled them. It is no Sort of De-

* N. B. This was done in *Laver's Case* after a much longer Debate than the Matter deserved.

THE REPORT.

fence in a Court of Law. But to prevent Misconstructions, Colonel *Carey* was examined touching the Terms upon which the Surrender was made. And he swore that the Duke expressly reserved the Rebels in *Carlisle* to be dealt with as his Majesty should please.

THE Court then observed that the Prisoners had received the whole Benefit of the Terms offered by the Duke, in that they were not immediately *put to the Sword*,* but were reserved for his Majesty's Pleasure; which now appears to be, that they shall have a fair Trial, and Liberty to make their Defence according to Law.

THEY then insisted that the Overt Acts are charged in the Indictment to be committed on the 10th of *October*, and that all the Evidence is of Overt Acts subsequent to that Time; And said, that however the Resolutions with Regard to this Point may have been before the 7th W. 3^d. Yet now, by that Act, no Evidence is to be given but of Overt Acts laid in the Indictment; and consequently the Overt Acts must be proved in such Manner as they are laid; That in this Case especially the King's Council are not at Liberty to vary in their Proofs from the Day laid, since they have confined themselves in the Indictment to one Day, and have not charged (as they said in most of the Precedents it is charged) that the Defendant did commit the Treason charged on him on the Day laid, and at divers Days and Times as well before as after.

Mr. Murray.

To this the Solicitor General answered that the 7th W. 3. makes no Alteration with Regard to this Point, so as to make either Time or Place more material than they were before the Act; The Act indeed saith, that no Evidence shall be given of any Overt Acts not laid in the Indictment; But what is or is not Evidence of such Overt Acts, is left upon just the same Foot in this Respect as it was before the Act; What was Evidence at Common Law is in this Respect Evidence still; And as to the Charging the Overt Acts at divers Days and Times as well before as after the Day particularly mentioned, He said that the greatest Part of the Precedents He had seen of Indictments for levying War, which is the present Case, do charge the Overt Acts on one Day only.

* See Lord *Winton's* Trial 6. St. Tri.

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SIR *Richard LLoyd* offered to speak on the same Side; but the Court told him he need not give himself the Trouble of speaking to the Point, on which there could be no Doubt, and overruled the Objection. †

Mr. *Townley* was convicted and executed.

Mr. DEACON's Case, July 17. 1746.

IN Mr. *Deacon's* Case his Council objected to the receiving the Evidence of one *Craig* a Printer, touching the Prisoner's obliging him to print the Pretender's Manifesto at *Manchester*, and his publishing of it there, while the Rebel Army was in the Town; and also to the reading the Manifesto. They insisted that this ought not to be given in Evidence, because it is an Overt Act not laid in the Indictment; and also because the Orders were given and the Manifesto printed and published in *Manchester*, and all the Overt Acts are laid in *Cumberland*.

BUT it was answered by the Court (Lord Chief Justice *Willes*, Justice *Abney*, and Justice *Foster*) that an Overt Act not laid may be given in Evidence, if it be a direct Proof of any of the Overt Acts that are laid.

ONE of the Overt Acts charged in this Indictment is the assembling and marching *Modo Guerino*, in Order to depose the King and to set the Pretender on the Throne. It is proved that the Prisoner with the rest of the Rebel Army was at *Manchester* and appeared in an Hostile Manner there. Now what stronger Proof can there be that the Prisoner joined this Army for the Purpose mentioned in the Indictment, than his causing to be printed and dispersed among the People the Pretender's Manifesto? It never was doubted that the being present with the Rebels and joining in proclaiming the Pretender, might be given in Evidence on such an Indictment as this; and yet that Circumstance was never expressly laid in any Indictment. But 'tis sufficient

† The Lord *Balmerino* who had neither Council nor Witnesses at his Trial, insisted on the same Point. And the House out of their extream Tendernefs in Case of Life (after my Lord Chancellor had delivered his Opinion clearly that the Time is not material, provided the Treason be committed before the Bill found) put the Question to the Judges. Lord Chief Justice *Lee* delivered the unanimous Opinion of the Judges, that the Day is not material, provided the Treason be proved to have been committed before the finding the Bill.

that

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that it proves *Quo Animo* the Rebel Army was raised, and *Quo Animo* the Prisoner joined it.

As to the Objection that this Fact was not committed in *Cumberland*, where all the Overt Acts are laid, Mr. Justice *Abney* and Mr. Justice *Foster* held, that it is indeed necessary on this Indictment that *some* Overt Act laid be proved on the Prisoner in *Cumberland*; but that being done, Acts of Treason tending to prove the Overt Acts laid, though done in a Foreign Country, may be given in Evidence.

AND the Manifesto was read.

LORD Chief Justice *Willes* declined giving any Opinion on the second Point. But no Objection was made during the whole Course of the Trials to the giving Evidence of Overt Acts in a County different from that where the Fact was laid, an Overt Act having been first proved in the proper County. And that * Sort of Evidence was given in almost all the Tryals.

Deacon was convicted and executed.

JOHN BERWICK's Case, July 17. 1746.

IN the Case of *John Berwick*, there was only one Witness that proved him to have been in Arms with the Rebels. This Witness proved that he was inrolled and reviewed as a Lieutenant in the Regiment called the *Manchester* Regiment, and did duty as such at *Penrith* and *Carlisle*.

Two other Witnesses (Officers in the Duke's Army) swore, that after the Surrender of *Carlisle*, they were ordered by the Duke to take an Account of the Names of the Officers and of their respective Ranks in the Rebel Garrison; that accordingly they went to the Prison where the Officers were confined apart from the Common Men, and took such Account of them; that the Prisoner *Berwick* appeared among the Officers, and gave in his Name to them as Lieutenant in the *Manchester* Regiment.

* The like Evidence was given in most of the Trials in the Rebellion of 1715. And admitted by the Judges upon the Commission in the North this Summer.

See the Cases of *Layser* and Sir *William Perkins* in the State Trials.

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LORD Chief Justice *Willes* and Mr. Justice *Abney* were of Opinion that this Declaration of the Prisoner is not to be considered as a bare *Confession after the Fact*, but as an Evidence of the Fact itself, *viz.* that the Prisoner did appear and take the Rank of a Lieutenant in the Rebel Garrison. They thought too, that a Confession after the Fact, proved by two Witnesses, was sufficient to convict within the 7. W. 3.

MR. Justice *Foster* doubted whether this Declaration being made *after the Surrender*, can be considered in any other Light than as a Confession after the Fact.* And with Regard to a Confession after the Fact, he said he never doubted whether it might be given in Evidence as a corroborating Proof; his Doubt was, whether it being proved by two Witnesses is a conclusive Evidence, or an Evidence sufficient of itself to convict without other Proof. Since the 7. W. 3. seems to require two Witnesses to Overt Acts, or a Confession in *open Court*.†

Berwick was convicted upon the Evidence of the Officers and of the other Witness, and was executed.

July 22. 1746.

ALL the Prisoners who then stood convicted were brought to the Bar to receive Judgment; and their Council *Serjeants Wynne* and *Eyre* took two Exceptions in Arrest of Judgment.

1st. THAT the Teste of the Commission is not set forth in the Caption of the Indictment, and consequently for aught appears on the Record, the Commission might issue before the Commencement of the Act, on which this Commission is grounded; and if so, the whole Proceeding is *coram non Judice*.

To this it was answered by the Attorney General, and agreed by the Court, that the Jurisdiction of the Court doth sufficiently appear on the Record. The Act of Parliament is undoubtedly the Foundation of this Proceeding: The Act and this Commission grounded on it are recited in the Caption: and it is expressly alledged, that the Com-

* Upon further Consideration I doubt there was too much Refinement in this Distinction. See 1. Disc. c. 3. S. 8.

† The like Evidence was held sufficient upon the Commission in the North this Summer; upon the Authority of the Judges's Opinions previous to the Tryals of *Greg* and *Francia*. See my Discourse on High Treason, Chap. 3. S. 8.

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mission did issue by Virtue of the Act. Which could not be true unless the Commission was subsequent to it.

THEIR second Exception, and on which they seemed chiefly to rely, was that the Act impowers the Crown to issue Commissions for trying Persons *then in Custody or who shall be in Custody for High Treason in levying War before the first Day of January next*, and it is not alledged in the Indictment that the Prisoners were in Custody at the Time of the Indictment: and consequently it doth not appear on the Record, that the Court hath any Jurisdiction over the Prisoners.*

To this it was answered by the Attorney General and agreed by the Court, that it doth sufficiently appear on the Record as it now stands, though not indeed on the Indictment, that the Prisoners are in Custody; the Record alledgeth that the Prisoners at the Time of their Arraignment being brought to the Bar in *the Custody of the Sheriff to whose Custody they had before been committed* for the Cause aforesaid, were asked &c.

† THE common Commission of Goal Delivery extendeth only to Prisoners in actual Custody; and yet it was never thought necessary to alledge in the Indictment that the Defendant was then actually in Prison; and if this Exception was to prevail, it would impeach all the Judgments that ever have been given at any Sessions of Goal Delivery.

THAT the Act on which the *Preston* Rebels were tryed runs in the very Words of this Act, all the Indictments at that Time were as these are, and this very Exception was then taken and overruled.

LORD Chief Justice *Lee* produced a Note he took at that Time in the Case of the ‡ *King and Oxburgh*: the same Exception was then taken and overruled upon the Reason last before given.

Judgment was then given as in Cases of High Treason.

Mr. Serjeant *Eyre* afterwards, viz. *August 2d.* took an Exception that bears some Affinity to the last in behalf of

* See the Case of *Æneas Macdonald* inf.

† V. 12. Mod. 449. the same Point.

‡ Upon the Trials of the Lords *Kilmarnock, Cromartie* and *Balmerino*, to guard against this Objection the Warrants for their Commitment were returned by the Lieutenant of the Tower, read and entered on the Journal.

Donald M'. Donald and some others who then stood convicted and were brought to the Bar to receive Judgment. It was, that it doth not appear that the Prisoners were *apprehended*; and saith he, in Fact they were not Apprehended but Surrendered. Whereas the Act of Parliament on which the Commission is grounded speaks only of Persons that shall be *apprehended* and in Custody.

THIS fine-spun Objection was likewise overruled. The Surrender was as much upon Compulsion, as the Submission of a Person who cries for Quarter in the Heat of Battle, is. In both Cases the Submission is by reason of a superior Force, and for Fear of immediate Death.

ALEXANDER M'GROWTHER'S Case,
July, 31. 1746.

IN the Case of *Alexander M'Growther*, there was full Evidence touching his having been in the Rebellion; and his acting as a Lieutenant in a Regiment in the Rebel Army called the Duke of *Perth's* Regiment. The Defence he relied on was, that he was forced in.

AND to that Purpose he called several Witnesses, who in general swore that on the 28th of *August* the Person called Duke of *Perth*, and the Lord *Strathballan* with about Twenty *Highlanders* came to the Town where the Prisoner lived. That on the same Day three several Summons were sent out by the Duke requiring his Tenants to meet him, and to conduct him over a Moor in the Neighbourhood, called *Luiny Moor*. That upon the third Summons the Prisoner, who is a Tenant to the Duke, with about Twelve of the Tenants appeared: That then the Duke proposed to them that they should take Arms and follow him into the Rebellion. That the Prisoner and the rest refused to go; Whereupon they were told, that they should be forced, and Cords were brought by the Duke's Party in Order to bind them; And that then the Prisoner and ten more went off, surrounded by the Duke's Party.

THESE Witnesses swore that the Duke of *Perth* threatened to burn the Houses, and to drive off the Cattle of such of his Tenants as should refuse to follow him. They all spoke

spoke very extravagantly of the Power Lords in *Scotland* Exercise over their Tenants ; and of the Obedience, (even to the joining in Rebellion) which they expect from them.

LORD Chief Justice *Lee*, in summing up observed to the Jury, that there is not nor ever was, any Tenure which obligeth Tenants to follow their Lords into Rebellion. *

AND as to the Matter of Force, he said, that the Fear of having Houses burnt or Goods spoiled, supposing that to have been the Case of the Prisoner, is no Excuse in the Eye of the Law for joining and marching with Rebels.

THE only Force that doth excuse is a Force upon the Person, and present Fear of Death ; and this Force and Fear must continue all the Time the Party remains with the Rebels. It is incumbent on every Man, who makes Force his Defence, to shew an actual Force, and that he quitted the Service as soon as he could ; Agreeable to the Rule laid down in *Oldcastle's Case*, that they joined *pro timore Mortis & recefferunt quam cito potuerunt*.

1 Hale. 50.

HE then observed that the only Force the Prisoner pretends to, was on the 28th of *August* ; and that he continued with the Rebels and bore a Commission in their Army, 'till the Surrender of *Carlisle*, which was on or about the 30th of *December*.

The Jury without going from the Bar found him guilty. But he was not executed.

N. B. ALL the Judges that were in Town were present and concurred in the Points of Law.

N. B. MANY of the *Scotch* Prisoners made Force their Defence and produced the same Sort of Evidence as *McGrowther* did ; and the same Directions in Point of Law were given as in his Case. And the Matter of Fact whether Force or no Force, and how long that Force continued, with every Circumstance tending to shew the Practicability or Impracticability of an † Escape, was left to the Jury on the whole Evidence.

August 23. 1746.

THIS Day Bills of Indictment were found against *Alexander Kinloch* and *Charles Kinloch* and others of the Rebels

* N. B. If Threats of this Kind were an Excuse, it would be in the Power of any Leader in a Rebellion to indemnify all his Followers.

† See 1 Discourse, Chap. 2. S. 8.

to the Number of 22. The Overt Acts were laid in different Shires in *Scotland* according to the respective Cases of the Prisoners. And then the Court adjourned to the 2^d of *September* for the Arraignment of the Prisoners.

September 2. 1746.

ON this Day, (there being no other Judge in Town) Mr. Justice *Foster* sat with two other Commissioners for the Arraigning the Prisoners. *Alexander Kinloch* and *Charles Kinloch* and the rest of the Prisoners, who were *Scotchmen* born, upon their Arraignment severally delivered a Paper into Court whereof the following is a Copy.

“ As I intend to insist on the Benefit of the Act of
 “ Union, by which all the Laws in *Scotland* at that Time
 “ which concern private Right are saved to the Natives
 “ of *Scotland*, and declared to be unalterable by the Par-
 “ liament of *Great Britain*, except for the evident Uti-
 “ lity of the Subjects within *Scotland*; And as I am a
 “ Subject born within *Scotland*, and stand indicted for
 “ Treasons charged to have been committed by me in
 “ *Scotland*, I humbly beg that the Court will be pleased
 “ to assign me Council and a Solicitor to advise me as to
 “ the Manner of Framing, and the Use to be made of
 “ this Defence; And that the Court will be pleased to
 “ indulge me in a few Days Time to advise with them,
 “ before I am compelled to plead; lest by pleading I
 “ may be deprived of the Benefit of any such Defence.

MR. Justice *Foster* told the Prisoners that Copies of their Indictments having been delivered to them in due Time, they ought now to have been ready to plead such Pleas as they would stand by; and that the Court expect they should now plead accordingly. He told them withal, that if the Matter contained in their Papers would avail them at all, they would have the full Benefit of it upon Not Guilty: since it amounts to no more than that their Cases are not within the Act of the last Session, by Authority of which Act alone, this Court sits. They then severally pleaded Not Guilty.

*The Case of ALEXANDER KINLOCH and
CHARLES KINLOCH, October 28. 1746.*

PRESENT Lord Chief Justice *Willes*, Mr. Justice *Foster*, and Mr. *Baron Clive*. *Alexander Kinloch* and *Charles Kinloch*, who were the first of the Prisoners concerned in the Paper delivered the Second of *September* that were brought to Trial, were set to the Bar ; and they agreeing in their Challenges, One Jury was sworn and charged with them by the Clerk of the Arraignments. The Junior Council for the Crown opened the Indictment, and the Solicitor General in a few Words opened the Evidence.

WHEN the Council for the Crown had proceeded thus far, the Chief Justice, *before any Evidence was given*, told the Prisoners Council, that He was informed they had some Objection to make in behalf of their Clients grounded on the Act of Union. Which Objection He said was proper to be spoke to before the Council for the Crown went into their Evidence. Whereupon Mr. *Jodrell* one of the Prisoners Council stated his Objection and spoke largely to it. The Chief Justice then said that the Objection being in Nature of a Plea to the Jurisdiction of the Court, could not be made on the Issue of Not Guilty ; nor could any Evidence in support of the Objection be received upon that Issue ; And therefore proposed that a Juror should be withdrawn ; and that the Prisoners should have leave to withdraw their Pleas of Not Guilty, and to plead this Matter Specially : And that the Attorney General might Demur, and so the Point would come regularly before the Court.

MR. Justice *Foster* said on this Occasion, that when He assured the Prisoners, they would have the full Benefit of this Objection on their Plea of Not Guilty, He had no Intention of leading them into a Difficulty, which they could not get clear of, without the Indulgence of the Court. He thought they would be intitled *Ex mero Jure* to the full Benefit of the Objection without such Indulgence ; And added, that the Principle he went upon was this ; If there be any Weight in the Objection, it must be that the Case of the Prisoners is not within the Act of the last Session,
under

under which Act alone this Special Commission is executed. And if it be not within that Act, it is a Case at Common Law; and consequently, taking it to be a Case at Common Law, if no Overt Act be proved in the County where the Commission sits, and whence the Jury comes, the Prisoners must of Course be acquitted.

SIR *John Strange* of Council with the Crown, strongly insisted that in Point of Law the Prisoners were intitled to the Benefit of the Objection on Not Guilty, if they could avail themselves of it; And the Attorney General offered to wave all Advantage that might be taken against the Prisoners, if any Advantage could be taken; and pressed that the Tryal might go on upon the Issue joined by them, and that the Merits of the Objection might be now considered.

BUT it was otherwise Ordered. And a Juror was withdrawn and the Jury discharged upon the Motion of the Prisoner's Council, and at the Prisoner's Request, and with the Consent of the Attorney General. And the Prisoners withdrew their former Plea, in order that they might be ready the next Day with their Pleas to the Jurisdiction in Form. To which the Attorney General declared he would Demur *instante*.

And the Court adjourned to the next Day.

THE Entry on the Record touching this Matter is as followeth.

UPON the Motion of Charles Hamilton Gordon Esquire and Joddrell Esq; being assigned as Council for the Defendants in this Cause and by their Consent, and also at the Desire and Request and by the Consent of the Defendants now at the Bar here, and also by the Consent of Mr. Attorney General on behalf of the King, It is ordered by the Court here, that Richard Foy the last of the Jurors sworn and impannelled in this Cause be withdrawn out of the Pannel; and that the rest of the Jurors in this Cause be discharged; No Evidence whatsoever having been given to the said Jury in this Cause either on the Part of the King or of the Defendants. And it is further ordered by the Court here that the said Defendants have leave to withdraw their Pleas of Not Guilty by them formerly pleaded to the Indictment in this Cause, and have leave to Plead to the Jurisdiction of this Court: And that the said Defendants

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have Time 'till to morrow to put in such Plea. And that they deliver Copies of such Plea to Mr. Sharpe Solicitor for the King in this Cause by Eight of the Clock this Evening. And thereupon the said Defendants do now here at the Bar withdraw their said Pleas of Not Guilty, in order to put in such Plea to the Jurisdiction of this Court as aforesaid.

October 29. 1746.

ON this Day, present the same Judges as Yesterday. *Alexander Kinloch* was first set to the Bar and again Arraigned, whereupon he tendered a Plea ingrossed on Parchment and signed by his Council *Mr. Gordon* and *Mr. Jodrell*; to which the Attorney General demurred, and the Prisoner instantly joined in Demurrer.

Plea.

AND the said *Alexander Kinloch* in his own proper Person comes and having heard the Indictment aforesaid read, and protesting that he is Not Guilty of the Premises charged in the said Indictment, for Plea Nevertheless saith, that he ought not to be compelled to answer to the said Indictment: Because he saith that the Kingdom of Scotland before and until the Time of the Union of the two Kingdoms of England and Scotland was regulated and governed by the proper Laws and Statutes of that Kingdom, and not by the Laws or Statutes of the Kingdom of England; and that ever since the said Union of the said two Kingdoms that Part of the Realm of Great Britain called Scotland hath been, and yet is governed and regulated by the proper Laws of that Part of the said Realm called Scotland, and not by the Laws of that Part of the said Realm called England.

AND the said *Alexander Kinloch* further saith that within the said Kingdom before the Union of the said two Kingdoms, and until the said Union thereof, and within that Part of Great Britain called Scotland ever since the said Union, there hath been and now is a certain Court called the Court of Justiciary; and that all and singular Offences of High Treason committed within the said Kingdom of Scotland before and until the said Union, and within that Part of the Realm of Great Britain called Scotland since the said Union, by the Natives thereof, apprehended or taken for such Offences there (except Peers of the Realm

Realm of Great Britain) have been and of Right ought to be enquired of, heard and determined in the said Court of Justiciary before the Justices of that Court, or in some other Courts, or before other Justices within the said Realm of Scotland before the Union, and within that Part of the Realm of Great Britain called Scotland since the said Union; and not in any Courts or before any Justices within the Realm of England before the said Union, or within that Part of the Realm of Great Britain called England since the said Union.

AND the said Alexander Kinloch further saith that Fochabars in the Shire of Murray in the said Indictment mentioned, the Place where the said Offence contained in the said Indictment is supposed to have been committed, before and until the said Union of the said two Kingdoms was within and Parcel of the said Kingdom of Scotland, and ever since the said Union was and now is lying within and Parcel of that Part of the Realm of Great Britain called Scotland.

AND the said Alexander Kinloch further saith that he was born within that Part of the Realm of Great Britain called Scotland (to wit) at Fochabars aforesaid; and that at the Time when the said Offence in the said Indictment contained is therein supposed to have been committed and long before that Time and since, he the said Alexander Kinloch was resident and commorant within that Part of Great Britain called Scotland (to wit) at Fochabars aforesaid. And this he is ready to verify. Wherefore the said Alexander Kinloch prays Judgment If the Court of our Lord the King here will further proceed upon the Indictment aforesaid against him, and that he may be dismissed from the Court here of and upon the Premises &c.

AND the said Sir Dudley Ryder Knight, Attorney General of our present Sovereign Lord the King who for our said present Sovereign Lord the King in this behalf prosecuteth, as to the said Plea of him the said Alexander Kinloch by him above pleaded as aforesaid, for our said present Sovereign Lord the King saith, that the said Plea and the Matter therein contained, are not sufficient in Law to preclude the Court here from their Jurisdiction to hear and determine the High Treason mentioned and specified in the said Indictment, and above charged upon him the said

Demurrer.

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Alexander Kinloch in and by the said Indictment. Wherefore for want of a proper and sufficient Answer in this behalf he prayeth Judgment, and that the said Alexander Kinloch may answer in Court here to our said present Sovereign Lord the King touching and concerning the Premises aforesaid.

Joynder in
Demurrer.

And the said Alexander Kinloch likewise.

THE Prisoner's Council admitted, that his Case is within the Letter of the Act of the last Session by Authority of which this Court sits: But insisted, that by the known Rules of Construction, if any great or manifest Inconveniences do arise from adhering closely to the Letter of the Act, the Court ought, and always doth depart from the literal Construction.

THE Construction they insisted on was, that for Offences committed in *England*, Commissions might issue for hearing and determining the same, in any County of *England*; and for Offences committed in *Scotland*, the like Commissions might issue into any County of *Scotland*, which would, they said, answer all the Ends of the Act, mentioned in the Preamble; and would at the same Time avoid all the Inconveniences which the Construction contended for in behalf of the Crown is attended with.

THEY then mentioned several Inconveniences attending such a Construction of the Act: Some of which might possibly have merited the Attention of the Legislature at the Time the Act passed.

MR. Attorney General, in answer said, that the Rules of Construction as applied to Acts of Parliament grounded on Inconveniences, whether Imaginary or Real, hold in no Cases but where the meaning of the Act is doubtfull: in plain Cases where the Intention of the Legislature is Evident, 'tis the Duty of the Court to put the Law in Execution, and to leave all Considerations of Inconveniences to the Legislature. And if the Parliament had intended that different Commissions should issue for the Trial of Treasons committed in *England* and *Scotland* respectively, they would have said so: they would not have impowered his Majesty to issue Commissions into any County or Shire within the United Kingdom.

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AND the Objection He said is not new, it was made, but without Effect, in behalf of a *Scotchman* concerned in the Rebellion of 1715. *

1. Geo. 1. c.
33.

THE Lord Chief Justice declared his Opinion, in which the other Judges present concurred, that the Prisoner's Birth, Residence and Apprehension in *Scotland* are Facts perfectly immaterial to the present Question. That they would have been so if the Case had been at Common Law. For at Common Law every Man is Triable, not where he was born, resided, or was apprehended, but where the Fact was committed; that these Facts being immaterial, and the whole Merits of the Objection appearing on the Face of the Indictment, the Prisoner might as well have Demurred to it, as pleaded in the Manner he hath done.

THAT in so plain a Case as this is, Arguments *ab inconvenienti* are of no Weight: The Law must take it's Course: Inconveniences in plain Cases are proper only for the Consideration of the Legislature.

HIS Lordship observed that the Words, *This Realm*, occur in four or five places in the Act, and that in every Place where they do occur, Except in the Clause in Question, they incontestably mean the united Kingdom of *Great Britain*, and can mean nothing else: And by no Rule of Construction can they be restrained in this Single Clause, to that Part of the Kingdom called *England*.

THE Court overruled the Plea, and ordered that the Prisoner should plead over to the Treason, and he pleaded Not Guilty. *Charles Kinloch* was then brought to the Bar, and being Arraigned a second Time on the Indictment pleaded likewise Not Guilty. And both Prisoners agreeing to join in their Challenges, a Jury (the same Persons who were sworn and charged with them Yesterday) was sworn and charged with them. And they were both found Guilty but not executed.

* This was the Case of *William Hay* upon the Special Commission at *Carlisle* in the Year 1716. The objection was then introduced not by Way of Plea to the Jurisdiction, but by Demurrer. And the Court after hearing the Prisoner's Council adjourned to the next Day; and having considered the Arguments of the Prisoner's Council agreed to overrule the Demurrer. Which being intimated to his Council he by Leave of the Court and with the Consent of the Solicitor General withdrew his Demurrer, and pleaded Guilty.

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Sir JOHN WEDDERBOURN's Case,
November 4. 1746.

THE Overt Acts were laid at *Aberdeen* in the Shire of *Aberdeen*. It was proved by two Witnesses that he was with the Rebels at *Aberdeen*; and by those and other Witnesses, that he was at divers other Places with them.

THE King's Council called Witnesses who proved likewise that he was appointed by the Pretender's Son Collector of the Excise; and that he did actually Collect the Excise in Several Places where the Rebel Army lay, by Virtue of that Appointment, for the Use of the Rebel Army.

THE Prisoner's Council insisted that this Sort of Evidence ought not to be admitted. For though Collecting Money for the Service of Rebels is an Overt Act of High Treason, yet it not being laid in the Indictment, no Evidence ought to be given of it; and they relied on the Statute of 7th of K. W. But in this they were overruled, upon the Reasons before given in the Case of *Deacon*. *

November 15. 1746.

Mr. Jodrell.

ON this Day, Present the Two Chief Justices, Mr. Justice *Wright*, Mr. Baron *Reynolds*, Mr. Justice *Abney*, Mr. Justice *Foster*, and Mr. Baron *Clive*. All the Prisoners who were convicted since the last Execution were brought to the Bar to receive Judgment. The two *Kinlocks Alexander* and *Charles* move by their Council in Arrest of Judgment: He took Notice of the Proceedings with Regard to the Prisoners on the 28th and 29th Days of *October*, and insisted that their Trial on the 29th (a Jury having been sworn and charged with them on the 28th) was a *Mistrial*, and the Verdict a meer Nullity.

HE was proceeding to State his Reasons and Authorities, when Lord Chief Justice *Lee* interrupted Him and said, That as there is a Variety of Opinions in the Books touching that Matter, which is really a Point of great Consequence, He thought it most advisable to postpone the further Consideration of it to the next Adjournment when he

* See the Cases of *Rockwood* and *Lowick* in the 4th State Trials.
should

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should desire the Assistance of all the Judges in the Commission. Then the Court after passing Sentence on the Others adjourned to the 15th of *December*.

N. B. THE Court being full, and the Bar crowded in Expectation of the Event of this Motion, Mr. Justice *Foster* thought it not improper to speak to the Purpose he spoke on the 28th of *October*. And he added, that from what was said by the Court on the 29th. He was confirmed in his Opinion that the Prisoners might safely have pleaded the General Issue. For it, as was then admitted, the whole Merits of the Objection appear on the Face of the Indictment, the Prisoners undoubtedly might have had the Benefit of it in Arrest of Judgment. So that, *Quacunqve Viâ*, whether they could have been let into it on Evidence (as they certainly might) or in Arrest of Judgment, they were not ill advised in Pleading the General Issue.

December 15. 1746.

ON this Day, Present the two Chief Justices, The Chief Baron, Mr. Justice *Wright*, Mr. Baron *Reynolds*, Mr. Justice *Abney*, Mr. Justice *Denison*, Mr. Baron *Clarke*, Mr. Justice *Foster*, and Mr. Baron *Clive*—Mr. *Jodrell* argued in behalf of the *Kinlochs* in Arrest of Judgment.

HE admitted that there is a Variety of Opinions in the Books touching the Power of the Court to discharge a Jury sworn and charged in a Capital Case. And that the Practice, during the Reign of King *Charles* the Second at least, went in favour of that Power. But he said that ever since the Revolution the contrary Practice hath uniformly prevailed. And even in the Time of *James* the Second the Judges in Lord *Delamere's* Case declared, that a Jury sworn and charged in a Capital Case cannot be discharged, but must give a Verdict. And Common Justice, he said, requires, that when a Prisoner is brought upon his Trial, and a Jury is once sworn and charged with him, He is to stand or fall by the Event of that Trial; otherwise his Life may be brought in Jeopardie for the same Fact as often as the Court pleases, and even when he is not so well prepared for his Defence.

4. State
Trials. 232.

To shew that the Law and Practice before the Restoration was with his Clients, he relied on the Authority of Lord *Coke* in his 1st Inst. 227. b. and 3^d Inst. 110. And to

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shew that the Judges since the Revolution concurred with Lord *Coke*, he cited *Carthew* 465; where it is Reported to have been said by *Holt* at the Sittings in *Guild-hall* on the Ninth Day of *November* 1698, in the Case of the King and *Perkins*, "That All the Judges of
 " *England* upon debate among themselves had agreed,
 " that a Jury sworn and charged in a Capital Case
 " cannot be discharged, though all the Parties consent
 " to it."

HE said that he had seen a MS. Note of the same Resolution by the late Mr. Justice *Tracy*, which agrees in Substance with *Carthew's* Report of it.

HE observed that according to *Carthew's* Report and *Tracy's* MS. the Judges at the same Time came to a Resolution, That in Criminal Cases, not Capital, a Juror may be withdrawn or Jury discharged by consent of all Parties, but not otherwise.

THAT the Practice since that Time in Criminal Cases hath been conformable to this Rule. For this he cited the Cases of the King and *Morgan*. *Hilary* 9. *Geo.* 2. on an Indictment for Perjury, and the King and *Jelf*, *Trinity* 7. *Geo.* 2. on an Indictment for Barratry; In both these Cases Lord *Hardwicke*, he said, at the Sittings refused to withdraw a Juror at the Prayer of the King's Council, because the Defendant's Council refused to consent to it, and cited this Resolution in *Carthew*. The Use he made of these two Cases was, that since this Regard hath been paid to the Authority of the Resolution in Criminal Cases as reported by *Carthew*, he hoped the same Regard would be now paid to that touching Capital Cases.

As to the Matter of Consent, he observed that Consent may Cure an Irregularity, but cannot Justify the breaking through any of the fundamental Principles of Law; especially such Rules as are in favour of a Prisoner who is answering for his Life. A Prisoner in this Circumstance, is hardly *Sui Juris*: He may be over-awed or surprized into a Consent, manifestly to his Prejudice: And therefore the Judges in the Resolution cited from *Carthew* (on which he relied as an Authority in Point with him) threw the Circumstance of the Consent quite out of the Case.

Upon the whole he concluded that Judgment ought to be arrested.

To

TO this it was answered by the Council on the Part of Mr. Attorney the Crown, that except the Resolution reported by *Carthrew*, there is not a Single Authority in the Books which saith that a Juror may not be withdrawn or the Jury discharged, even in Capital Cases, with the Consent of all Parties. That it was done in the Case of *Mansell* so long ago as the 26th of *Eliz.* And all the Judges of *Serjeants-Inn* in *Fleet-Street* then agreed that it might be done, and had often to their Knowledge been done. That the Rule laid down by Lord *Coke* in his first and third Institutes runneth in General Terms and doth not indeed except the Case of Consent, but that Case must be supposed to be excepted.

Mr. Attorney
General.
Sir John
Strange.
Mr. Solicitor
General.

1. And. 103.
104.

THAT it frequently hath been done since Lord *Coke's* Time, even without Consent, where the Circumstance of the Prisoner, or the Demands of Publick Justice did require it. And for this they cited 2. *Hale*. 295. 296. 297. 1. *Vent*. 69. *Keil*. 46. 47. 52.

THEY said they did not cite these Books with an entire Approbation of the Practice in every Instance in which it prevailed; for some of the Cases, particularly *Whitebread's*, ought never to be drawn into Example: But only to shew what the Opinion of those Times was.

2. State Trials.

THAT the Opinion of the Judges in Lord *Delamere's* Case doth not affect the present Question. For the only Question proposed to the Judges was, Whether in the Trial of a Peer in the Court of the Lord High Steward, the Court might, after Evidence given, adjourn the Peers Triers from Day to Day. The Judges did not presume to answer that Question, it being a Point of Judicature of which that Court alone was the proper Judge. But they did say that in the Case of a Common Jury sworn and charged, they ought to give their Verdict before they are discharged: Meaning only, that a Jury in a Capital Case cannot be adjourned and separated after Evidence given, but must be kept together 'till they agree on their Verdict. The Occasion which led them to say this sheweth, that the Case of an Adjournment was what they had then in Contemplation, and not the Case of a Total Dismission of the Jury. And so doth the Reason they give for the Practice; this, they say, is done for fear of Tampering and Corruption. In the Case of a bare Adjournment there may be Room for this Fear, but

but in the Case of a Total Dismission, when no Verdict is to be given, there cannot.

4. State Trials. THEY insisted on *Rookwood's* Case as a Case in Point. For had the Prisoner's Council taken Exceptions to the Indictment coming within the Restrictions of the Act of the 7th of King *William*; and had those Exceptions been allowed, the Indictment must have been Quashed, and the Jury, though sworn and charged, must have been dismissed; and yet it cannot be imagined that the Quashing that Indictment and discharging that Jury, would have discharged the Prisoner from answering to the Treason on a Fresh Bill of Indictment.

As to the three Resolutions reported by *Carthew*, the two last, they said, are manifestly against Law, in the latitude laid down in that Book. The King in a Civil Case may by His Prerogative withdraw a Juror, for he cannot be Non-suit; And it is frequently done in Informations in the Exchequer on Account of the Revenue; And though the Court refused to do it in the Cases of *Morgan* and *Jelfs* cited on the other Side, yet in the Case of one *Wilkinson Paschæ* 6. *Geo.* 2. which was an Indictment for misapplying Money raised on the Scavengers Rate, the Court did discharge the Jury at the Prayer of Mr. Justice *Abney* then one of the King's Council, without the Defendant's Consent.

It is objected, that a Prisoner may be drawn into a Consent to his own Prejudice; But certainly a Prisoner may do much more than Consent, he may abandon all Defence, he may plead Guilty. He may on his Trial wave all his Challenges and put himself on the first Twelve that shall appear. An Accessary cannot be brought to his Trial before the Principal is convicted or outlawed; But if he pleaseth he may wave that Privilege and submit himself to a Trial, and it shall not be Error, *because he consented*. Besides in the present Case, what was done was at the Prayer of the Prisoners, and, as the Court then took the Case, manifestly for their Advantage.

1. Hale. 35. CASES may happen, where the Court, *Ex debito Justitiæ*, and out of Regard to the Prisoner, ought to discharge the Jury, and postpone the Trial. The Case put by Lord *Hale* of a Madman putting himself on his Trial is strong
to

to this Purpose. And other Cases of the like Kind may be put.

ON the whole they prayed Judgment for the King.

SIR *John Strange* cited a Record of *Hilary 8. H. 7. Rot. 3.* a Copy whereof he brought into Court. It was an Indictment for Murder, and not Guilty pleaded. The Jury having heard all the Evidence, withdrew to consider of their Verdict, and being returned, delivered their Verdict into Court in Writing. And being examined by the Court how they came by that Writing, confessed that it was delivered into their Hands by the Prisoner at the Bar as they passed by him. The Court thereupon discharged the Jury of the Prisoner, and committed them for this Misbehaviour. And a new Venire was awarded. And the Second Jury brought him in not Guilty.

The Arguments being long, and the Day far spent the Court deferred giving their Opinion to the 20th.

December 20. 1746.

ON this Day, present the same Judges as on the 15th: The Court delivered their Opinions *Seriatim*. And all, except One, agreed that Judgment ought to pass upon the Prisoners. They agreed, That admitting the Rule laid down by Lord *Coke* to be a good general Rule, yet it cannot be universally binding: Nor is it easy to lay down any Rule that will be so. The Rule cannot bind in Cases where it would be productive of great Hardship or manifest Injustice to the Prisoner.

IN the present Case, the Prisoners were advised upon their Trial to object to the Jurisdiction of the Court; But having pleaded to issue, it was *said* that they were too late with that Objection. In order therefore to let them into the Benefit of this Objection, Liberty is given them, at their Request, to withdraw their Plea of Not Guilty, before Evidence given, and to plead to the Jurisdiction. Now the Plea of Not Guilty being withdrawn, the Jury had no Issue to Try, nor Evidence before them, and must of Course therefore be discharged; And consequently the Prisoners have no Right to complain of that which was a necessary Consequence of an Indulgence shewn them by the Court.

THE Judges who concurred in this Opinion paid very little Regard to the Resolution reported by *Cartbew*; not only

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only for the Reasons insisted on by the Council for the Crown, but because, as no other printed Report of that Time taketh any Notice of this Resolution, it is very doubtful whether there ever was any such Resolution or no. Especially since Mr. Baron *Clarke* informed the Court that he hath a MS. Report of the late Lord Chief Justice *Eyre* of the Case of the King and *Perkins*, in which Case *Cartbew* supposeth *Holt* to have reported this Resolution.

THE Case was thus, *Perkins* was indicted for Perjury in an Answer in Chancery: The Issue came on to be tried before *Holt* at the Sittings in *Guildball* the ninth Day of *November* 1698. When the Bill was produced by the Council for the Prosecution in order to intitle them to read the Answer, it appeared that the Bill had never been filed, so that neither Bill or Answer could be read. *Holt* offered to stay 'till the Prosecutors could send the Bill to the Office and have it filed. But they foreseeing that it could not be done in any reasonable Time, their Council insisted on behalf of the Crown, upon withdrawing a Juror; *Holt* would not allow of it, and the Defendant was acquitted.

HOLT upon this Occasion said, "I have had Occasion to consider of this Matter. In Criminal Cases a Juror cannot be withdrawn but by Consent. And in Capital Cases it cannot be done, even with Consent."

THIS is the whole of the Case as reported by *Eyre*, not a Word of any Resolution of the Judges on the Point. And *Holt's* Manner of Expression, *I have had Occasion to consider*, seemeth to imply that the Opinion he gave was the Result of his own Thoughts on the Subject.

WITH regard to *Tracy's* MS. it was observed by Mr. Justice *Abney*, that *Tracy* was * not an *English* Judge at the Time the Judges are supposed to have come to these Resolutions, or even so early as the Year 1698. And therefore he must have taken up the Matter upon Report at second hand.

THEY all agreed that the Opinion of the Judges in Lord *Delamere's* Case doth not affect this Question, for the Reasons insisted on by the King's Council; And joined in condemning the Proceedings in the Case of *Whitebread* and *Fenwick*, as cruel and illegal.

* He was an *Irish* Judge at this Time.

THE learned Judge who dissented, admitted that the discharging the Jury in the present Case was an Instance of great Indulgence towards the Prisoners. But he thought it safer to adhere to the Rule of Law, which is clearly laid down by Lord *Coke*, than, upon any Account, to establish a Power in Judges which, it is admitted, hath been grossly abused, and may be so again.

HE observed that *Mansell's* Case was the first, and except the present, is the only Case wherein the Prisoner's Consent appears to have been taken: And that the asking the Prisoner's Consent in *Mansell's* Case plainly betrayeth a Conscioufness in the Judges that the Thing was irregular, and could not be done at the Discretion of the Court.

CASES He said have been put where the Circumstances of the Prisoner seem to require that such a Power should be lodged in the Court. And other Cases may be put, where publick Justice seemeth to require the same. But these are particular and single Inconveniences. And the Policy of the Law of *England*, and indeed the true Principles of all Government, will rather suffer many private Inconveniences than introduce One publick Mischief.

He considered the Trial by the same Jury which is sworn and charged with the Prisoner, as Part of the *Jus publicum*; as a sacred *depositum* committed to the Judges, which they ought to deliver down inviolate to Posterity. And concluded that the Trial on the 29th being irregular, No Judgment ought to be given on that Conviction.

But Judgment was given as in Cases of High Treason.

MR. Justice *Foster* delivered his Opinion in this Case as followeth.

THIS Case hath been very well argued at the Bar; but the Council on both Sides went into the General Question, touching the Power of the Court to discharge Juries sworn and charged in Capital Cases, further than I think was necessary.

THE General Question is a Point of great Difficulty, and of mighty Importance. And I take it to be one of those Questions, which are not capable of being determined by any general Rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single Rule which can be made to govern the
infinite

infinite Variety of Cases which may come under this general Question, without manifest Absurdity ; and in some Instances, without the highest Injustice.

I therefore choose to consider the present Question singly as it standeth upon the Record, and to throw out of it every Consideration that is foreign to it. And possibly by so doing most of the Objections that have been made in the present Case may receive this short Answer, That they are levelled at an *improper Exercise* of the Power, but do not reach the present Case.

THE Question therefore is not, whether a Jury may be discharged after Evidence given, in order to the preferring a new Indictment better suited to the Nature of the Case ; where, through the Ignorance or Collusion of the Officer, or the Mistake of the Prosecutor, the Fact laid varieth from the real Fact, or cometh short of it in Point of Guilt.

Keil. 46. 52.
Comb. 401.

THIS was frequently done before the Revolution, and in one or two * Instances since. But this is not the present Question.

1. Vent. 69.

NOR is the present Question, Whether the Court may discharge a Jury sworn and charged, where undue Practices appear to have been used to keep material Witnesses out of the Way ; or where such Witnesses have been prevented by sudden and unforeseen Accidents.

2. Hale. 295.
296. 297.

THIS likewise is not the Question, and I give no Opinion on it ; only let it be remembered, that Lord Chief Justice *Hale* justifieth this Practice, which he saith prevailed in his Time and had long prevailed, by strong Arguments drawn from the Ends of Government and the Demands of publick Justice.

2. State Trials.

NOR is it now a Question, nor I hope will it ever be a Question again, Whether in a Capital Case the Court may in their Discretion discharge a Jury after Evidence given and concluded on the Part of the Crown, meerly for want of sufficient Evidence to convict ; and in order to bring the Prisoner to a second Trial, when the Crown may be better prepared.

THIS was done in the Case of *Whitebread* and *Fenwick*, and it was certainly a most unjustifiable Proceeding. I hope it will never be drawn into Example.

* See *Anne Hawkin's* Case inf.

NOR is the present Question, Whether the bare Consent of the Prisoner, unassisted by Council and consenting to his own *Prejudice*, will render the Court quite blameless in discharging a Jury after Evidence on both Sides and concluded.

THIS was done in the Case of *Mansel*, which hath been cited at the Bar : But I think it ought not to have been done ; for notwithstanding what the Record saith of the Uncertainty and Insufficiency of the Verdict, the Truth of the Case was no more than this, The Jury were not agreed on any Verdict at all ; And therefore nothing remained to be done by the Court, but to send them back, and to keep them together, 'till they should agree to such Verdict as the Court could have received and recorded ; and the Prisoner ought not to have been drawn into any Consent at all ; For in Capital Cases I think the Court is so far of Council with the Prisoner that it should not suffer him to consent to any Thing manifestly wrong, and to his own Prejudice. 1. And. 103.

I thought proper to premise these Things in order to clear the present Question of every Consideration which I take to be Foreign to it.

AND now I will state what I take to be the present Question : And that is,

WHETHER in a Capital Case, where the Prisoner may make his full Defence by Council, the Court may not discharge the Jury upon the Motion of the Prisoner's Council, and at his own Request, and with the Consent of the Attorney General *before Evidence given*, in order to let the Prisoner into a Defence, which in the Opinion of the Court, he could not otherwise have been let into.

AND I am clearly of Opinion that a Jury may in such a Case be discharged. And that the discharging the Jury under these Circumstances, will not operate so as to discharge the Prisoner from any future Trial for the same Offence.

IT seems that an Opinion did once prevail that a Jury once sworn and charged in any Criminal Case whatsoever, could not be discharged without giving a Verdict ; but this Opinion is exploded in *Ferrar's Case* ; and it is there called a *Common Tradition* which had been held by many learned in the law. Ray. 84.

My

My Lord *Coke* was one of those learned Men who gave into this Tradition, as far at least as concerneth Capital Cases; and he layeth down the Rule in very general Terms, in the Passages which have been cited on behalf of the Prisoners from his first and third Institutes.

p. 269.

THE same Rule is laid down in *Hale's* Summary of the Pleas of the Crown. A very faulty incorrect Piece, never revised by him, nor intended for the Press.

BUT as his Lordship in his History of the Pleas of the Crown justifieth the contrary Practice, his Authority is clearly on the other Side of the Question. And his Authority is the more to be regarded, because he had seen and well considered the Passages cited from Lord *Coke*; though I believe the Rule, as it standeth in his Summary, hath contributed not a little to the confirming many People in *Coke's* Opinion.

MY Lord *Coke* layeth down the Rule in very General Terms; but he hath not given us any of the Principles of Law or Reason whereon he groundeth it. He hath indeed in his first Institute, cited one, and but one Authority in support of it, and that Authority doth not, to my Apprehension, in the least warrant it.

21. E. 3. 18.

A Man was indicted for Larceny, and upon his Arraignment pleaded Not Guilty and put himself upon the Country: And afterwards when the Jury was in Court, he prayed the Liberty to become an Approver, and this was denied him; for when Issue is joined it ought to be tried. And he was tried and found Guilty, and hanged.

THIS is the whole of that Case. Here is not the least Intimation given of any general Principle, that a Jury once sworn and charged cannot be discharged without giving a Verdict; nor did the Court, as I apprehend, go upon that Principle. It went upon a Principle quite different, a Principle adapted solely to the Case then before the Court, which I shall mention presently.

Corone, 449.

INDEED *Fitzherbert*, who abridgeth this Case, doth say, that the Reason of the Judgment was, that the Inquest having been once charged, could not be discharged; Which possibly might induce Lord *Coke* to draw the same Conclusion from that Case.

BUT

BUT the Reason given by *Fitzherbert* is not the Reason given in the Book. Nor doth it so much as appear by the Book that the Jury was sworn; the Words of the Book are, "*Après quant l' Enquest fuit icy,*" afterwards when the Jury was here, or in Court; whether sworn or not doth not appear by the Book. But whether the Jury was sworn or not, there was not the least Occasion to resort to any general Principle, *That a Jury once sworn cannot be discharged*: because there was, as I hinted before, another Rule at hand adapted to the Case of an Approver, which I think wholly governed that Case.

AND the Rule was this, that a Person who had once pleaded to issue, could not after that be admitted to a Confession in order to save his own Life, by charging other Persons supposed to be his Accomplices in the same Fact. For by once solemnly denying the Fact upon his Arraignment, he had in the Opinion of those Times lost all Credit, and so could not be received as an Evidence against other People.

THIS Rule is laid down by *Stanford*, and it prevailed for a long Time: And 'tis observable, that *Brooke*, who abridgeth this very Case, carrieth the Reason the Court went upon no further than the Law then went in the Case of an Approver; His Words are, "A Man was "arraigned for Felony and pleaded Not Guilty, and afterwards would have become an Approver, and was "not suffered, *because he had joined Issue before.*" Not because the Jury was sworn and could not be discharged, but because he had on his Arraignment denied the Fact.

THUS then standeth the Case with regard to the single Authority cited by Lord *Coke*; the Judgment did not go upon the general Principle laid down by him and *Fitzherbert*, but upon a Principle peculiar to the Case of an Approver.

IT must be owned that the Judges did in after-times abate of their Rigour with regard to the Case of Approvers: and did admit Persons to the Liberty of approving, not only after Issue joined, but even after the Jury was sworn and Evidence in part given; but seldom after the Evidence gone through and concluded; as appeareth from several Instances mentioned by Lord *Hale*.

2 Hale. 228.

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BUT

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BUT then it must be owned on the other hand, that whenever they did so, they went in flat Contradiction to the general Rule laid down by *Coke* and *Fitzherbert*.

I will only add with regard to this Point, That the admitting, or not admitting Persons to become Approvers, was always considered as a Matter of *meer Discretion* in the Court; as a Matter of Grace and not of Right. And yet we see that in a Matter of *meer Discretion* the Court did frequently upon the Special Circumstances of the Case, discharge Juries after they were sworn and charged, and had in part heard the Evidence.

THESE Instances therefore must be considered as so many Exceptions to the General Rule: though I confess they do not come up to the Case of discharging one Jury, and bringing the Prisoner to his Trial by another.

BUT still they shew that the Rule now contended for on the Part of the Prisoners, cannot be true in the Latitude the Words import. And I think they do in part shew what I hinted in the Beginning, that no General Rule can govern the Discretion of the Court on this Question, in all possible Cases and Circumstances.

BUT this will appear in a stronger Light in those Cases where the Circumstances of the Prisoner appear on his Trial to be such, as that the Trial cannot proceed without manifest Injustice to him.

A great Variety of Cases might be put upon this Head. But as this is a Point which ought to be treated with great Caution, I think it safer to cite a Case which I find stated to my Hand, than to suppose and argue from any Cases of my Own.

1 Hale. 35.

THE Case I mean is that put by Lord *Hale*, which was mentioned the last Time at the Bar.

“ IN Case a Man in a Phrenzy happen by some
“ Oversight to plead to his Indictment and put him-
“ self on his Trial: And it appeareth to the Court
“ on his Trial that he is Mad; the Judge in Dis-
“ cretion may discharge the Jury of him; and remit
“ him to Gaol to be tried after the Recovery of his
“ Understanding.”

BUT without resorting to Authorities in a plain Case, the common Sense and Feeling of Mankind, the Voice of Nature, Reason, and Revelation all concur in this plain Rule,

Rule, *That no Man is to be condemned unheard*; and consequently no Trial ought to proceed to the Condemnation of a Man who by the Providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him. And Common sense will at the same Time tell us, that the bare postponing a Trial under these Circumstances, will not discharge the Prisoner from a future Trial, when his present Disability shall be removed.

THIS Case is surely an Exception to any General Rule that the Wit of Man can lay down on this Point.

ANOTHER Case which I take to be an Exception to the General Rule contended for in behalf of the Prisoners, is, when by the Indulgence of the Court, and the Consent of the Attorney General, the Trial of the Issue goeth off, after the Jury sworn and charged; in order to intitle the Prisoner to some Advantage in Point of Defence, which in the Rigour of the Law he could not otherwise be intitled to.

AND this I apprehend appeareth from the Case of 4. State Trials: *Rookwood* which also was cited at the Bar.

IN that Case the Jury was sworn and charged, and the Indictment opened by the King's Council. The Prisoner's Council then offered some Exceptions to the Indictment, apprehending, as they said, that since the Act of 7th King W. declareth that the Exceptions therein mentioned shall not be taken *after Evidence given*, the Prisoner by a favourable Construction of the Act, had Liberty to take Exceptions at any Time *before Evidence*.

THE Court was unanimously of Opinion that the Prisoner's Council had lapsed their Time for taking any Exceptions at all. That the proper Time for taking Exceptions is before Issue joined, or at least before the Jury sworn.

AND yet it being a Case of Life, and on a new Act of Parliament, the Court did agree that in that Instance only, the Council should be at Liberty, with the Consent of the Attorney General, to take their Exceptions: confining themselves to the Exceptions mentioned in the Act, of which they could not have the Benefit in Arrest of Judgment.

THE Prisoner's Council declined to enter into their Exceptions under that Restriction, and so the Trial went on.

But had Exceptions under the Restrictions of that Act been taken and allowed, the Indictment must have been quashed; and the Jury then sworn and charged must have been discharged without giving a Verdict.

LORD Chief Justice *Holt* did not come readily into the Expedient proposed by the rest of the Judges, of letting the Prisoner's Council into their Exceptions, even with the Consent of the Attorney General: and in the Conclusion declareth that the Attorney could not consent to it, *Unless he would also consent to discharge the Jury.*

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THESE are his Words as I have taken them from the printed Trial. His Lordship surely at that Time entertained no Doubt, that at the Prayer of the Prisoner and his Council, and with the Consent of the Attorney General, a Jury sworn and charged in a Case of High Treason might be discharged. The other Judges present (who were the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and four of the puisne Judges) must certainly be of the same Opinion; Otherwise they would never have given way to the taking of Exceptions, which if they had been allowed must have ended in discharging the Jury: and at the same Time could not in the Nature of Things have operated, so as to discharge the Prisoner from answering to another Indictment for the same Offence.

It is said, on the Authority of a very short and imperfect Note in *Carthew*, That in less than two Years afterwards, all the Judges of *England* upon debate among themselves came to a Resolution, that in Capital Cases a Juror cannot be withdrawn, though all Parties consent to it.

It was very properly asked by the Council for the Crown, upon what Occasion this Debate among the Judges was had? whether any Case was then depending in Judgment before them which gave rise to the Conference, and which was to be governed by this Resolution, and what were the particular Circumstances of that Case, if any such there was? These questions I say were very properly asked. For the true Extent of all Rules of this Kind, however generally they may be penned, is, and always will be, in a great Measure, adjusted by the Circumstances of the Case under Consideration at the Time when the Rule appears to be given.

It seems Endeavours have been used to come at the necessary Light in these Particulars, but to no Purpose. Only it is said upon the Authority of a MS. of a late learned Judge, that this Resolution among others, was taken upon a Conference among the Judges in relation to an Indictment against the then Sheriffs of *London* for a bare Misdemeanour, but what were the Circumstances of that Case or what became of it doth not appear. And therefore I freely own, this Extrajudicial Opinion (for with regard to Capital Cases it is Extrajudicial) weigheth very little with me in the present Question: And doth by no means shake the Authority of *Rookwood's* * Case, which I take to be a case very nearly in point with the present; and moreover was a Case where the Point did judicially come before the Court, and in which the Court had the Assistance of very able Council on both sides of the Question.

Tracy.

THE only Difference between the Cases is this, *Rookwood* could not have had the Benefit of his Exceptions without the Indulgence of the Court, and Consent of the Attorney General; whereas the Prisoners at the Bar might, in my Opinion, have had the full Benefit of their Point of Law without either. I need not repeat what I said on this Head the last Time I spoke of this Matter. But as a Doubt arose on that Point, the Expedient now under Consideration was thought of. This expedient the Court came into at the Prayer of the Prisoners and their Council, and with the Consent of the Attorney General.

NOT to bring the Prisoners Lives twice in Jeopardie, (which is one great Inconvenience of discharging Juries in Capital Cases) but meerly in order to give them one Chance for their Lives, *which it was apprehended* they had lost by Pleading to Issue

NOR was it done to postpone their Trials to an unreasonable Distance, when their Witnesses might be dead or wearied out by a long and expensive Attendance, (which is another great Inconvenience which may attend the discharging of Juries at Discretion, and was an Ingredient of great hardship in the Case of *Whitebread* and *Fenwick*) but in order to bring them to a Trial with all the Speed that

* See *Holt's* and *Tracy's* Opinion in 1704. in the Case of *Anne Hawkins*, at the End of this Case.

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might be, in Case their Plea should be overruled. And accordingly they were Tried the very next Day, as soon as Judgment was given on their Plea.

UPON the whole, my Opinion is, that all general Rules touching the Administration of Justice must be so understood, as to be made consistent with the fundamental Principles of Justice. And consequently all Cases where a strict Adherence to the Rule would clash with those fundamental Principles, are to be considered as so many Exceptions to it. The Cases I have mentioned, and many others that might be mentioned, are Exceptions to the General Rule insisted on in behalf of the Prisoners.

The Case at Bar is I think an Exception to that Rule ; and at the same Time standeth clear of the Inconveniences mentioned by the Prisoner's Council.

THE discharging the Jury in this Case was not a Strain in favour of Prerogative, it was not done to the Prejudice of the Prisoners, on the contrary it was intended as a Favour to them.

IN that Light I say it was considered by the Court, in that Light it was considered by the Prisoners and their Council, and accordingly they prayed it ; and in that Light Mr. Attorney General, with his usual Candour, consented to it.

AND in that Light I know of no Objection in point of Law or Reason to it. And therefore I am of Opinion that Judgment ought not to be arrested.

MR. Justice Tracy's MS. having been cited in the foregoing Case by the Prisoner's Council and taken some Notice of by the Court, I think it not amiss to subjoin from *the same MS.* which I had not then seen, a Report of the following Case.

“ AT the Sessions at the Old Bayly before *Easter Term*
 “ 1704, *Anne Hawkins* was indicted for breaking the Man-
 “ sion House of *Samuel Story* in the Night time. It ap-
 “ peared on Evidence that the House belonged to the *Af-*
 “ rican Company, that *Story* was an Officer of the Com-
 “ pany, and that he and many other Persons as Officers of
 “ the Company had separate Apartments in the House, in
 “ which they inhabited and lodged ; and that the Apart-
 “ ment

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“ ment of *Story* was broke open. It was held by *Holt*
 “ Chief Justice, *Myself*, and Baron *Bury*, That the
 “ Apartment of *Story* could not be called *his* Mansion
 “ House ; because he and the others inhabit in the House
 “ meerly as Officers and Servants of the Company : And
 “ thereupon the *Jury* was discharged of this Indictment,
 “ and it was amended, and laid to be the Mansion House
 “ of the Company.”

THE Record hath been looked into. It warranteth the Report of the learned Judge in the substantial Parts of it, though in some Points it is defective. Two Bills were in Fact preferred against the Woman, the first for Burglary and Larceny in the Dwelling House of *Samuel Story*, to which she pleaded and put herself upon the Country. The second for Burglary and Larceny in the Mansion House of the *African* Company, in which she is charged to have committed the Burglary upon the *same Day*, and to have stolen the *very same Goods*, as in the former Bill.

IT appeareth upon this second Bill that she was acquitted of the Burglary and found Guilty of the Larceny. But it doth not appear by any Entry on the first, that the Court proceeded on it farther than the receiving and recording her Plea, and remanding her to *Newgate* ; probably 'till the second amended Bill could be prepared and sent to the Grand Jury. But certainly it is more reasonable to impute this Defect to the Neglect of the Officer who omitted to make the proper Entry, than to imagine that the learned Judge was totally mistaken in a plain Matter of Fact, falling within his own Knowledge.

ANOTHER Circumstance which may beget some Doubt might be, and probably was, owing to *meer Accident*. The first Bill is *now* found upon the File among the Indictments of the then next preceding Sessions [*March 8th 1703.*] But it ought to be remembered that neither *Holt*, *Tracy* nor *Bury* attended at that Time : And that it appeareth by the Record that they all did attend at the following Sessions. At which Time, according to the Judge's Report, the Point came under Consideration upon Evidence given on the first Bill, and the second amended by the Direction of the Court was preferred.

*The Case of Mr. CHARLES RATCLIFFE,
Michaelmas, 20. Geo. 2. in the King's Bench.*

HE was concerned with his Brother, the late Earl of *Derwentwater*, in the Rebellion of 1715; and in May 1716, was convicted and attainted of High Treason before Special Commissioners of Oyer and Terminer pursuant to the Act of the first of Geo. I. While he was under Sentence of Death, and probably before the Act of General Pardon of the third of Geo. I. * passed, he made his Escape out of *Newgate* and got over to *France*.

AT the latter End of the Year 1745, he was, with some other Officers, *French, Scotch and Irish*, taken on the Coast on board a *French Ship of War*; which was Loaden with Arms, Ammunition and other Warlike Stores, bound, as was supposed, for *Scotland*; where the Rebels were at that Time in Arms.

ON *Friday* the 21. *November* 1746, he was brought to the Bar by virtue of a *Habeas Corpus* directed to the Constable of the Tower or his Deputy: And the Record of his Conviction and Attainder was at the same Time removed thither by *Certiorari*.

THE *Habeas Corpus* with the Return, and also the *Certiorari* and Record of the Conviction and Attainder being read, the substance of the Record was opened to him in *English* by the Secondary on the Crown side; who then asked him what he had to say why Execution should not be done upon him according to the Judgment. He prayed that Council might be assigned him, and named Mr. *Ford* and Mr. *Jodrell*; who were accordingly assigned his Council.

THEY prayed a few Days Time that they might have an Opportunity of knowing from the Prisoner himself the Truth and Merits of his Case, which was granted.

THEY also prayed a Copy of the Record, which was denied them. But the Officer, by the Direction of the Court, read over the Indictment a second Time very dis-

* See the 45th Sect. of the Act.

tingly, and the Prisoner's Council took Notes of it, and the Prisoner was ordered up on *Monday* next.

HIS Council moved for a Rule of Court that they might have Access to their Client at all seasonable Times. But his Solicitor admitting that he had obtained a Warrant from a Secretary of State to the same Purpose, the Court did not make any Rule in the Case, nor did the Council press it. But the Court declared, That if the Secretary's Warrant had not been obtained, they would have made such Rule. For the Prisoner is now the Prisoner of this Court; and the Lieutenant of the Tower, is, as far as concerneth the Prisoner's Case, a Minister of this Court, and subject to the Rules of it.

November 24. 1746.

THE Prisoner was brought to the Bar, and being again arraigned, he, *Ore tenus*, pleaded that he is not the Person mentioned in the Record before the Court. The Attorney General, *Ore tenus*, replied, the Prisoner is the same *Charles Ratcliffe* mentioned in the Record, and this I am ready to verify; and Issue was joined.

THE Prisoner's Council pressed strongly to put off the Trial of this Issue, upon an Affidavit of the Prisoner, which was sworn in Court, that two material Witnesses named in the Affidavit are abroad; one of them at *Brussels*, and the other at *Saint Germain's*; and that he believeth they will attend the Trial if a reasonable Time be allowed for that Purpose. But the Court refused to put off the Trial, and a *Venire* was Awarded returnable *instantèr*. For, said the Court, this Proceeding is in Nature of an Inquest of Office, and hath been always considered as an instantaneous Proceeding; *unless proper Grounds for postponing the Trial be laid before the Court.*

It was so considered in the Case of the King against *Barkstead* and others upon the same Issue as this is. A *Venire* was awarded, and a * Jury returned and sworn *instantèr* to try that Issue. It was so considered likewise in the Case of the † King against *Roger Johnston* in this Court, *Michaelmas* the Second of this King.

IF Mr. *Ratcliffe* hath any Thing to offer, which may give the Court reasonable Grounds to believe that his Plea is any

* See the Record inf. in Dr. *Cameron's* Case.

† See a Report of the Case.

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Thing more than a Pretence to delay Execution, we are ready to hear him ; the single Issue is, whether he be or be not the Person mentioned in this Record. This is a Fact well known to *him* : And if he is not the Person, he might if he had pleased have made that Matter part of his Affidavit. He may do so still if he can do it with Truth. And if he refuseth to give the Court this Satisfaction touching the Truth of his Plea, the Court doth him no Manner of Injustice in denying him the Time he prayeth.

As the Jurymen were called to the Book, the Prisoner challenged one of them, and insisted on his Right to a peremptory Challenge ; but his Challenge was overruled. For though there are some Opinions in the Books that in Collateral Issues of this Kind the Prisoner hath a peremptory Challenge, yet the later and better Opinion is that he hath not ; and the modern Practice hath gone accordingly.

S. P. C. 163.
Co. L. 157.

2. Hale. 267.

1. Lev. 62.

1. Keb. 244.

CHIEF Justice *Hale* saith, " In Case of an Issue joined " on Error in Fact assigned for reversing an Outlawry, " the Prisoner hath no Peremptory Challenge ;" and in p. 278. of the same Book it seemeth to be admitted as a general Rule, that in Inquests of Office (and the present Trial is in Nature of an Inquest of Office) the Prisoner hath no peremptory Challenge. In *Barkstead's* Case cited before, the Prisoners were not permitted to Challenge peremptorily ; And in the Case of *Roger Johnson*, which hath likewise been already cited, the Court declared that the Prisoner had no peremptory Challenge.

THE Jury being sworn to try the Issue, the Indictment was read over to them in *English* for their Information as to the Name and Addition of the Prisoner ; and the Evidence being concluded, the Jury withdrew for a few Minutes, and then returned with their Verdict, that the Prisoner at the Bar is the same *Charles Ratcliffe* that is mentioned in the Record.

Note. THE Prisoner during the Trial of this Issue had the Assistance of his Council ; who cross-examined the King's Witnesses, and observed fully upon the Evidence.

AFTER the Verdict was brought in, the Prisoner's Council took Notice of the Act of General Pardon passed in the third of Geo. I. and said that POSSIBLY their Client might upon *Consideration* be found to be intitled to
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the Benefit of it; and concluded with a Motion, that the Court before they award Execution would give them some Time to consider the Act, and to be informed by their Client touching the Circumstances of his Case: That they might be able to submit his Case to the Opinion of the Court, how far he is, or is not intitled to the Benefit of the Act.

BUT the Court declared, that the Prisoner having once pleaded in Bar of Execution, and that Plea having been falsified by the Verdict, his Plea is peremptory, and the Verdict conclusive; and nothing now remaineth but for the Court to award Execution.

MR. Justice *Foster* was satisfied that the Principle the Court went upon is a good General Rule; but he thought it not Universally true. He considered the Case of a Parliamentary Pardon as an Exception to it; for surely the Court will never, in any State of a Cause, award Execution upon a Man who plainly appeareth to be pardoned. And therefore He thought that if any Person, whether as Council for the Prisoner or as *Amicus Curiae*, will now shew that the Prisoner is intitled to the Benefit of the Act, he ought to be heard. But to this it was answered by the Chief Justice, That the Act of Pardon containing many Exceptions both as to Persons and Crimes, the Party who would take the Benefit of it must plead it Specially with all proper Averments; so as to shew that he is not within any of the Exceptions, according to the Resolution in the Earl of *Salisbury's* Case.

Carth. 131.

THE Council for the Crown did not urge either of these Points against the Prisoner. And I have been since informed that, in Favour of Life, they were determined to wave them; and were provided with Evidence then attending in the Hall to prove (which was the Truth of the Case) that the Prisoner after his Attainder made his Escape out of *Newgate*, which brought him within the Exception in the 45th Section of the Act. And the Prisoner's Council being apprized of this by the Council for the Crown in a Conversation between them at the Bar, thought it in vain to press their Motion any farther. And Execution was accordingly awarded: And a Rule made that it be done on *Monday* the 8th of *December*. And a Writ was ordered to the Lieutenant of the Tower

Tower to deliver the Prisoner to the Sheriff of *Middlesex* on that Day; and another to the Sheriff to receive him, and to cause Execution to be done.

N. B. SINCE the Prisoner's Council, after sufficient Time allowed them to inform themselves of the true State of his Case, had nothing to offer to induce the Court to think that their Client was intitled to the Benefit of the Act, only that POSSIBLY upon further Consideration he may appear to be so intitled, there was certainly no Room to delay the awarding Execution upon so slight a Suggestion from the Bar. And Mr. Ratcliffe had no Injustice done him in that Respect.

He was beheaded on *Tower Hill* on the Day mentioned in the Rule.

THE Award of Execution in Mr. Ratcliffe's Case was agreeable to the Precedent in the Case of Sir *Walter Raleigh*. He was convicted and attainted at *Winchester* before Special Commissioners, and being brought into the King's Bench by *Habeas Corpus*, Execution was there Awarded on the former Judgment: Judgment not being pronounced afresh, it having been pronounced before.

IN the Cases of *H. Stafford* and of *Barkstead, Okey* and *Corbet*, who were attainted by Act of Parliament, the Tenour of the Acts was removed by *Certiorari* into Chancery, and sent thence by *Mittimus* into the King's Bench: And the Chief Justice pronounced the usual Judgment as in Cases of High Treason.

THERE was no Proceeding of this Kind in the Case of the Duke of *Monmouth*, who was attainted by Act of Parliament 1. *Ja.* 2^d. For the Action at *Sedgemoor* happened on the 8th of *July* 1685, which in that Year fell out to be the last Day of *Trinity Term*: And on the 15th he was Executed. But that was a Time of great Heat and Violence, and few Things then done ought to be drawn into Example.

N. B. THE Act of the 3^d of *Geo. I.* giveth the Party liberty to take Advantage of it on the General Issue without specially Pleading the same; And so doth that on which the Earl of *Salisbury* relied. The Court therefore could not in the Earl's Case ground itself on the Rule of Pleading laid down in *Cartbew*; though the Rule might possibly

Cro. Jac.
495.
Hutt. 21.

1. H. 7. 23.
24. 25.
1. Lev. 61.
1. Sid. 72.

2 W. and M.

possibly be mentioned *obitèr* by some of the Judges. I think the true Ground the Court went upon, which indeed the Reporter himself seemeth to hint at, but very darkly, was that the Earl having been committed by the House of Peers upon an Impeachment by the Commons for High Treason, this Court cannot allow him the Benefit of the Act; it hath no Cognizance of the Crime he standeth charged with; the Matter lieth before another and higher Judicature, and thither his Lordship must resort.

AND there he afterwards had the full Benefit of the Act without being put to plead it. For on the 2^d October 1690, upon reading the Earl's Petition, setting forth that he had been long a Prisoner in the Tower *notwithstanding the late Act of free and general Pardon*, and praying to be discharged, the Lords ordered the Judges to attend on the Monday following to give their Opinions, whether the Earl be pardoned by the said Act; on the 6th the Judges delivered their Opinions, That if his Offences were committed before the 13th of February 1688, and not in Ireland, or beyond the Seas, he is pardoned. Whereupon it was resolved that He be admitted to Bail; and the next Day he was bailed, and on the 30th of October † he and his Sureties were discharged from their Recognizances.

THE Rule laid down in *Carthew* from *Plowden* is laid down in the same Latitude in many of the old Books. But it is to be observed, that the Acts of General Pardon in those Times had no Clauses enabling the Party to avail himself of the Pardon on *the General Issue without specially Pleading the same*. The first Act which hath that Clause, that I have met with, is the Act of Oblivion (12th Car. 2.) and all Acts of general Pardon since that Time have had Clauses to the same Purpose.

† See the Journals of the Lords.

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Michae'lmas, 2. Geo. 2. B. R.

The Case of ROGER JOHNSON cited twice in Mr. Ratcliffe's Case was thus.

THE Defendant stood outlawed upon the Indictment for High Treason in diminishing the Current Coin of the Kingdom, and was taken and committed to *Newgate*. Being now brought to the Bar by *Habeas Corpus*, he offered to surrender himself to the Chief Justice, pursuant to the Act of the 5th and 6th E. 6. c. 11. (being within the Year) and to traverse the Indictment; alledging that he was at *Flushing* beyond the Seas at the Time the Outlawry was pronounced.

THE Chief Justice said we cannot refuse to accept his Surrender; he must be remanded to *Newgate*. And let a Special Entry be made that he offered to surrender, and to traverse the Indictment. *

AT another Day in the same Term the Defendant was again brought to the Bar, and he tendered a Plea in Parchment "That he was out of the Realm on the 8th of *February* when the Outlawry was pronounced, and pleaded "over to the Treason;" which Plea was received. The Attorney General prayed that he might have a Copy of the Plea, and three Days Time to demur or join Issue, which was granted; the Court declaring that the Attorney might have joined Issue *instantèr*; and that on the Trial of such Issue the Prisoner could not challenge any of the Jury without Cause. The Prisoner prayed Council and had four assigned.

AT another Day in the same Term the Prisoner being at the Bar, by leave of the Court withdrew his Plea; and pleaded the Substance of it, *viz.* his being beyond Sea on the 8th of *February, Ore tenus*. The Attorney General *Ore tenus* replied, "I say he was within the Realm on the 8th of *February*, and I traverse his being then out of the "Realm." Issue being thus joined, the Court awarded a *Venire* returnable *instantèr*, and the Sheriff, sitting the

* This Justice was refused to Sir *Thomas Armstrong* in a like Case. Vide 3. Mod. 47. and 3. St. Trials. 895.

Court, returned a Jury. Then the Prisoner's Council opened the Plea and Case, and called their Witnesses; and the Attorney General insisting that the Witnesses should be examined apart, they were so examined; as likewise were the Witnesses produced on the Part of the Crown.

THE Prisoner's Council managed the whole in his behalf, and three of them were heard on the Reply. And the Jury, after a short Recess, returned with their Verdict, "That the Prisoner was out of the Realm on the 8th of February."

THEN the Prisoner was arraigned on the Indictment, to which he pleaded Not Guilty; and the Attorney joined Issue and prayed a *Venire* returnable the first Return of the next Term; which the Court Awarded, and the Prisoner was remanded to *Newgate*.

THIS Note of *Johnson's* Case was communicated to me by my good Friend the late Mr. Justice *Abney*. The Case is reported by Serjeant *Barnardiston* in his first Volume. And by Sir *John Strange*.

Hilary, 20. Geo. 2.

The Case of JOHN MURRAY of Broughton.

PLEAS before our Lord the King at *Westminster* of *Hilary* Term in the Twentieth Year of the Reign of our Sovereign Lord GEORGE the Second, by the Grace of God of *Great Britain, France and Ireland*, King, Defender of the Faith.

Amongst the Pleas of the King Roll.

ENGLAND. Our present Sovereign Lord the King hath transmitted to his Beloved and Faithful Sir William Lee Knight, and his Associates, Justices of our said present Sovereign Lord the King, assigned to hold Pleas before the King Himself, his Writ of *Mittimus*, together with a Writ directed to the Clerk of his Parliaments, and the Return made to the same; and also the Record of a certain Act of Parliament of our said present Sovereign Lord the King made at *Westminster* closed in these Words; To our Beloved and Faithful Sir William Lee Knight, and others his Associates, our Jus-

The Writ of
Mittimus.

tices

Certiorari.

tices assigned to hold Pleas before Us, Greeting: We send you inclosed in these Presents the Tenour of a certain Writ of *Certiorari* directed to our beloved *Ashley Cowper*, Esqr. Clerk of our Parliaments, together with the Return indorsed upon the Back of the said Writ; and also the Tenour of a certain *Act* whereof mention is made in the same Writ, intituled, An *Act* to attaint *Alexander* Earl of *Kellie* [the Persons intended to be attainted are here named among whom *Mr. Murray* is One] of High Treason, if they shall not render themselves to One of his Majesty's Justices of the Peace on or before the Twelfth Day of *July* in the Year of our Lord 1746, and submit to Justice. The Tenour of which said *Act*, We for certain Reasons have caused to be brought before us into our Chancery; and We do hereby command You that having inspected the Tenour of the said *Act*, You further cause to be done thereon that which of Right, and according to the Law and Custom of England, You shall see fit to be done. Witness Ourself at Westminster the Tenth Day of February in the Twentieth Year of our Reign. The Tenour of the said Writ of *Certiorari*, and the Return made to the same, and also the Tenour of the said *Act* in the said Writ mentioned follow in these Words, GEORGE the Second, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, To our beloved *Ashley Cowper* Esquire, Clerk of our Parliaments, Greeting; We being willing (for certain Reasons) to be certified concerning the Tenour of a certain *Act* by Us made and enacted, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in Parliament assembled at Westminster, the Seventeenth Day of *October* in the Nineteenth Year of our Reign, intituled An *Act* to attaint *Alexander* Earl of *Kellie* [Names repeated] of High Treason, if they shall not render themselves to One of His Majesty's Justices of the Peace, on or before the Twelfth Day of *July* in the Year of our Lord 1746, and submit to Justice, Do command You that, immediately after the Receipt of this Writ, You do distinctly and openly send before Us into our Chancery the Tenour of the said *Act*, with all Things touching the same, as fully and perfectly as the same now remaineth in Your Custody, together with this Writ. Witness Ourself at Westminster the Seventeenth Day of *February* in the Twentieth Year

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of our Reign. *The Execution of this Writ appeareth in The Return; a certain Schedule to this Writ annexed as within I am commanded. Ashley Cowper Cler' Parliamentor.' In the Parliament held at Westminster the Seventeenth Day of October in the Year of our Lord 1745. And in the Nineteenth Year of the Reign of Our Sovereign Lord GEORGE the Second, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and there continued by several Adjournments until and unto Wednesday the Fourth Day of June 1746, by the Consent of the Lords as well Spiritual as Temporal, and of the Commons, and by the Consent of the King's Majesty then present, the following Statute (amongst others) was Ordained, Enacted and Established. (to wit) An Act to attaint Alexander*

The Title of the Act.

Earl of Kellie [Names repeated] of High Treason, if they shall not render themselves to one of his Majesty's Justices of the Peace on or before the Twelfth Day of July in the Year of our Lord 1746, and submit to Justice. Whereas Alexander Earl of Kellie [Names repeated] on or before the Eighteenth Day of April in the Year of our Lord 1746, Did in a Traiterous and Hostile Manner take up Arms and Levy War against his present most gracious Majesty within this Realm, contrary to the Duty of their Allegiance, and are fled to avoid their being apprehended and prosecuted according to Law for their said Offences; be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, that if the said Alexander Earl of Kellie [Names repeated] shall not render themselves to one of his Majesty's Justices of the Peace on or before the 12th Day of July in the Year of our Lord 1746, and submit to Justice for the Treasons aforesaid, then every of them the said Alexander Earl of Kellie [Names repeated] not rendering themselves as aforesaid, and not submitting to Justice as aforesaid, shall from and after the said Eighteenth Day of April in the Year of our Lord 1746, stand and be adjudged attainted of the said High Treason to all Intents and Purposes whatsoever, and shall suffer and forfeit as a Person attainted of High Treason by the Laws of the Land ought to suffer and forfeit; and every of the said Justices of the Peace

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are hereby required to commit every of them the said *Alexander Earl of Kellie* [*Names repeated*] so surrendering Himself to Prison for the said High Treason, there to remain 'till He shall be discharged by due Course of Law, and thereof immediately to give Notice to one of his Majesty's principal Secretaries of State. *I Ashley Cowper Clerk of Parliaments, by Virtue of the Writ of our Lord the King of Certiorari to me directed, and to these Presents annexed, Do certify that what is above written is the true Tenour of the Act of Parliament abovesaid in that Writ expressed. In Witness whereof to this Schedule I have set my Seal, and subscribed my Name, dated the ninth Day of February in the twentieth Year of the Reign of our said Lord the King, and in the Year of our Lord 1746.*

MR. *Murray* being brought to the Bar by *Habeas Corpus* directed to the Lieutenant of the Tower, the foregoing Record was read to him by the Secondary on the Crown side: And the Attorney General prayed that Execution might be awarded. The Secondary then demanded of him what he had to say why Execution should not be awarded.

THE Prisoner *Ore tenus* pleaded that he did surrender himself to the Lord Justice Clerk of *Scotland* (who is a Justice of the Peace) at *Edinburgh* the 28th of *June* last. Whereupon the Attorney General declared that he had Authority from his Majesty to confess the Truth of the Prisoner's Plea, and did accordingly confess it. And the Court ordered the Prisoner's Plea, and the Attorney General's Confession, to be recorded; and that the Attorney take nothing by his Motion, and that the Prisoner be remanded.

Note. THIS Gentleman was made use of as an Evidence against Lord *Lovat* on his Impeachment. And it was suggested on that Occasion, that the Attorney's confessing the Truth of the Plea by Warrant from his Majesty, was a Strain of Prerogative, calculated to elude the Force of the Act of Attainder, and to serve the Turn of making Mr. *Murray* an Evidence. But whoever considereth that he was actually brought before the Lord Justice Clerk on the 28th of *June* (fourteen Days before the Time limited by the Act for his surrendering was expired),

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expired) and was the same Day by him committed to the Castle of *Edinburgh*, where he was kept close Prisoner 'till he was removed to the Tower; whoever considereth this, must admit, that, with whatever View he might be brought up at this Time, he had merely that Justice done him now by his Majesty's Order, which at one Time or other, whenever he should have been brought upon the Foot of the Act of Attainder, could not be denied him.

THE Intent of the Act was answered by his being made amenable to Justice before the Time limited for his Surrender. And he being kept close Prisoner 'till the Day for Surrendering was past, it was put out of his Power to comply strictly with the Letter of it; and therefore his Non-compliance ought not to be fatal to him.*

See *Roger Johnson's Case* before.

Pass. 20. Geo. 2. B. R.

The Case of JOHN HARVEY.

PLEAS before our Lord the King at *Westminster* of *Easter Term*, in the Twentieth Year of the Reign of our Sovereign Lord *GEORGE* the Second, by the Grace of God of *Great Britain, France and Ireland*, King, Defender of the Faith.

Amongst the Pleas of the King Roll.

Middlesex. Our present Sovereign Lord the King hath sent to his Keeper of his Gaol of Newgate his Writ closed in these Words (that is to say) GEORGE the Second, by the Grace of God of Great Britain, France and Ireland, King Defender of the Faith, To the Keeper of our Gaol of Newgate, Greeting; we command You that the Body of John Harvey, being committed and detained in our Prison under your Custody (as it is said) together with the Day and Cause of the taking and detaining of

* I have been informed that Mr. *Murray* was now brought up in Order to obviate an Objection that might have been made to his Evidence upon the Authority of Lord *Duffus's Case*, reported in *Com. 440*. But that Case differeth from this. Lord *Duffus* was not amenable to Justice before the Expiration of the Time given by the Act; nor, merely through his own Default, could be. But I doubt Lord *Duffus's Case* favoured too much of the *Summum Jus*.

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him, by whatsoever Name the said *John Harvey* may be called therein, you have immediately after the Receipt of this Writ before us at *Westminster*, to undergo and receive all and singular such Things as our said Court shall then and there consider of concerning him in this behalf, and that you then have there this Writ, Witness Sir *William Lee* Knight, at *Westminster*, the twenty seventh Day of *May*, in the twentieth Year of our Reign. And now (that is to say) upon Saturday next after the morrow of the Ascension of our Lord in this same Term, before our said present Sovereign Lord the King at *Westminster*, cometh *Richard Akerman* Gentleman, his Majesty's Keeper of his said Gaol of *Newgate*, and returneth the said Writ as followeth: The Execution of this Writ appeareth in a certain Schedule to this Writ annexed, the Answer of *Richard Akerman* Keeper of his Majesty's Gaol of *Newgate* within mentioned; I *Richard Akerman* Gentleman, Keeper of his Majesty's Gaol of *Newgate*, in the Writ to this Schedule annexed, mentioned, do most humbly certify and return to our most serene Sovereign Lord the King, that before the coming to me of the said Writ (to wit) on the twenty first Day of *April* in the Year of our Lord 1747, the said *John Harvey*, in the said Writ mentioned, was committed to my Custody, and is now detained in the same, by Virtue of a Warrant under the Hand and Seal of *Thomas Burdus*, Esquire, one of the Justices of our said present Sovereign Lord the King, assigned to keep the Peace of our said present Sovereign Lord the King in and for the County of *Middlesex*, and also to hear and determine divers Felonies, Trespasses, and other Misdemeanours committed within the same County, which said Warrant is in these Words and Figures following: *Middlesex*, to wit, 'To the Keeper of his Majesty's Gaol of *Newgate*; Receive into your custody the Body of *John Harvey* of *Pond Hall* in the County of *Suffolk*, Farmer, being a Person, amongst others, armed with Fire Arms and other offensive Weapons, after the twenty fourth Day of *July* 1746, assembled in Order to be aiding and assisting in the running, landing, or carrying away prohibited or uncustomed Goods, and being, by his Majesty's Order in Council of the Fifteenth of *January* last published in the *London Gazettes* of the 17th and 20th of that Month required, amongst others, to surrender themselves within the

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the Space of forty Days after the first Publication thereof in the *London Gazette*, to the Lord Chief Justice, or one other of His Majesty's Justices of the Court of King's Bench, or to any of His Majesty's Justices of the Peace: And the said *John Harvey* not having surrendered himself in Obedience to the above mentioned Order, but having been apprehended, taken, and brought before me one of His Majesty's Justices of the Peace for the County of *Middlesex*, by *Thomas Hales* Gentleman, one of the Officers or Assistant Officers to His Majesty's Commissioners of the Customs; and the said *John Harvey* being, by reason of his not surrendering himself pursuant to the said Order, but neglecting or refusing so to do, by Virtue of the Statute in that Case made and provided, adjudged, deemed, and taken to be Convicted and attainted of Felony, and to suffer Pains of Death as in Cases of a Person convicted and attainted by Verdict and Judgment of Felony without Benefit of Clergy, the said Offence being charged to have been committed in *England*; these are therefore to require you to receive into your Custody in the said Prison the Body of the said *John Harvey*, and him there safely keep, until he shall be from thence discharged by due Course of Law. Given under my Hand and Seal this 21st April 1747. *Thomas Burdus*. (L. S.) *And this is the Cause of the taking and detaining of the said John Harvey, whose Body I have ready before our said present Sovereign Lord the King at the Time and Place within mentioned, as by the said Writ I am Comanded: And at the same Time before our said present Sovereign Lord the King at Westminster cometh Sir Dudley Ryder Knight, Attorney General of our said present Sovereign Lord the King, and in the presence and hearing of the said John Harvey in the said above recited Writ and Return named, being now brought to the Bar here in his own proper Person, under the Custody of the said Keeper of His Majesty's said Gaol of Newgate (into whose Custody he the said John Harvey had been before committed for the Cause aforesaid in manner aforesaid,) He the said Attorney General of our said present Sovereign Lord the King, for our said present Sovereign Lord the King saith, that since the 24th Day of July, which was in the Year of our Lord 1746. (to wit) upon the twelfth Day of January in the twentieth Year of the Reign of our said present Sovereign Lord*

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GEORGE the Second, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and so forth, at the Parish of Saint Paul Covent Garden in the County of Middlesex, It was in due Manner charged before Thomas Burdus, Esqr. one of his Majesty's Justices of the Peace of and for the County of Middlesex, assigned to keep the Peace of our said present Sovereign Lord the King within and for the said County of Middlesex, and also to hear and determine divers Felonies, Trespasses, and other Misdemeanours committed within the same County, by Information of Thomas Jones, a credible Person, upon Oath by him subscribed, that he the said John Harvey in the said Writ and Return named, and Several other Persons to the Number of three and more, being armed with Fire Arms and other offensive Weapons, since the twenty fourth Day of July, which was in the said Year of our Lord 1746. (to wit) upon the eighth Day of October in the twentieth Year aforesaid, were assembled at Beauacre in the County of Suffolk, in Order to be Aiding and Assisting in the running, landing, and carrying away Uncustomed Goods; And the said Attorney General of our said present Sovereign Lord the King further saith, that he the said Thomas Burdus did forthwith (to wit) on the said twelfth Day of January, at the Parish of Saint Paul Covent Garden, certify under his Hand and Seal, and return the said Information so made and given before him as aforesaid, to the most Noble Thomas Holles Duke of Newcastle, one of His Majesty's Principal Secretaries of State, who did, as soon afterwards as conveniently might be (to wit) upon the fifteenth Day of the same Month of January in the twentieth Year aforesaid, at the Parish of Saint Paul Covent Garden aforesaid, lay the same before His Majesty in Privy Council, and that his Majesty did at the same Time and Place last mentioned, thereupon make His Order in His Privy Council, thereby requiring and commanding the said John Harvey (amongst others in the said Order particularly named) to surrender himself within the Space of forty Days after the first Publication thereof in the London Gazette, to the Lord Chief Justice, or one other of His Majesty's Justices of the Court of King's Bench, or to any other of His Majesty's Justices of the Peace; which said Order the Clerks of His Majesty's Privy Council did cause

to be forthwith printed and published in the two next successive London Gazettes, and upon the said fifteenth Day of January cause the same to be forthwith transmitted to the Sheriff of the said County of Suffolk; which said Sheriff did within fourteen Days after the Receipt thereof, cause the same to be proclaimed between the Hours of Ten in the Morning and Two in the Afternoon, in the respective Market Places upon the respective Market Days of the two Market Towns in the same County of Suffolk, the said two Market Towns being near to the Place where the said Offence was charged to have been committed as aforesaid; And that a true Copy of the said Order was likewise within the said fourteen Days affixed up upon a publick Place in each of the said two Market Towns, according to the Directions and agreeable to the true Sense, Intent and Meaning of the Statute in that Case lately made and provided; And the said Attorney General of our said present Sovereign Lord the King, for our said present Sovereign Lord the King further saith, that the said John Harvey did not surrender himself pursuant to His Majesty's said Order so made in his Privy Council as aforesaid, but did neglect so to do; By reason whereof He the said John Harvey in the said Writ and Return named, is, and standeth convicted and attainted of Felony pursuant to the Statute in that Case made and provided: And all these Matters and Things be the said Attorney General of our said present Sovereign Lord the King, for our said present Sovereign Lord the King is ready to verify and prove as the Court shall award. Wherefore he prayeth in the behalf of our said present Sovereign Lord the King, that the said Court here would proceed to award Execution against him the said John Harvey for the Felony aforesaid, according to the Directions of the said Statute.

THIS Proceeding was grounded upon the Statute of the 19th of Geo. 2^d. the Substance of which, as far as concerneth the present Case, is set forth in the Suggestion on the Roll. A Doubt was made at the Bar, Whether it was necessary to suggest the several Matters on the Roll in the Manner they are suggested, in order to ground a Prayer for Execution.

THE Court declared that it is certainly necessary that those Matters should be suggested on the Roll. They are

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the several Steps which the Act requireth to be taken by the Crown, in order to bring the Prisoner under an Attainder. And he may traverse all or any of them. Indeed when Persons are attainted by Name, which was the Case of Mr. *Murray* last Term, a Transcript of the Act of Attainder is sufficient whereon to ground a Prayer for Execution. But here is a general Law which 'tis presumed affecteth the Prisoner at the Bar. But he will not be affected by it, unless the several Requisites mentioned in the Act have been complied with in his Case; and if he traverseth all or any of them, the *Onus probandi* lieth on the Crown.

MR. *Ford* (assigned Council for the Prisoner) took an Exception to the Suggestion, that the Proclaiming the Prisoner in two Market Towns was not set forth with sufficient Certainty; because the Names of the Market Towns were not set forth; so that the *Prisoner could not give a particular Answer to that Part of the Suggestion, nor come properly prepared with his Proofs when the Issues shall come to be tried.

BUT the Court was of Opinion that if the Prisoner would take Advantage of the Insufficiency of the Suggestion, He must Demur. He cannot take Advantage of it on Motion. If he Pleadeth, he must do it *Instantér* and *Ore tenus*. There can be no Inconvenience in his Pleading *Instantér*, if he intendeth to put the Proof of All the Matters Suggested on the Roll, upon the Crown.

THEN the Prisoner by Advice of his Council, said, "I Deny all the Facts Averred in the Suggestion," and the Attorney General replied, "I Aver that all the Facts alledged in the Suggestion are true." And the Prisoner was remanded: And at the Prayer of the Attorney General, Monday the 22^d June was appointed for the Trial of the several Issues, and a *Venire* was Awarded on the Roll for that Day.

MR. *Ford* on behalf of the Prisoner moved for a Copy of the Suggestion, but that was denied. However the Court told Him it should be read again if He pleaded, which Mr. *Ford* declined.

* N. B. The Suggestions grounded on this Act of Parliament, which have been proceeded upon since this Case of *Harvey*, have generally set forth the Market Towns by Name, which is undoubtedly the best Way, for the Reasons suggested by Mr. *Ford*.

ON the 22. *June* (*Trinity* 21. *Geo.* 2.) the Prisoner being brought to the Bar, the Jury was called and sworn to try the several Issues joined between the King and the Prisoner. And the Suggestion was read by the Secondary on the Crown side for the Information of the Jury, and they were by him charged to inquire of the several Facts alledged in the Suggestion, on which Issues had been joined. And the Junior Council for the Crown having opened the Suggestion, the Attorney General went into the Proof of the several Issues.

THE several Facts touching the laying the Information before Mr. *Burdus* against the Prisoner and others; his certifying it in due manner to the Duke of *Newcastle*; his Grace's laying it before the King in Council; The Order of Council (which was produced *under the Seal of the Council*) requiring the Prisoner and others to surrender within forty Days after Publication in the *London Gazette*; The transmitting this Order to the Printer of the Gazette; the Publication of it in due Time in two successive Gazettes, and the transmitting it to the Sheriff of the County of *Suffolk*, in order to it's being proclaimed and published as the Act directeth, were well proved.

THEN the Undersheriff of *Suffolk* and other Witnesses were called to prove the proclaiming and fixing up the Order in two Market Towns near *Beauacre*, the Place where the Fact is charged in the Information taken by Mr. *Burdus* to have been committed. And it appeared on their Evidence, that it was proclaimed and fixed up at *Ipswich*, which is thirty Miles from *Beauacre*; at *Hadly*, which is forty two Miles from *Beauacre*; and at *Leostoff*, which is five Miles from *Beauacre*, and at no other Places; and that there are five or six Market Towns nearer to *Beauacre* than *Ipswich*; particularly *Southwold* five, and *Beacles* eight Miles.

MR. *Ford* on behalf of the Prisoner insisted that the Act hath not been complied with; the Act indeed doth not say that it shall be in the *next* Market Towns, but still it must be in the Market Towns *near* the Place; and the Distance of thirty Miles cannot with any Propriety be called near, when it appeareth by the Evidence of Witnesses on the Part of the Crown, that there are at least

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least three Market Towns within a third Part of that Distance. And of this Opinion was the Court.

THIS, said they, is a very Penal Law, and we are in a Manner in an untrodden Path, and therefore must walk with great Caution. What we do in this Case, which is the first that hath arisen on this Act, will probably govern all other Cases that may arise on it. And it will be of mischievous Consequence to give the Sheriff a greater Latitude than the Legislature intended to give Him. Some Latitude it did intend to give, and therefore did not confine him to the *next* Market Towns; because that would have rendered the Execution of the Act difficult, and subject to great Niceties.

BUT the Law did not intend to leave the Matter wholly to the Discretion of the Sheriff; and therefore, it requireth that it be done in the Market Towns *near* the Place. This Word is plainly restrictive of the Sheriff's Power; it is a Guide to his Discretion in the Execution of the Act: And what doth it mean? Not surely the most remote Town; nor doth it mean a Town *comparatively* remote, as, it is plain from the Evidence, *Hadly* and *Ipswich* are.

ON the whole, the Court without summing up a Tittle of the Evidence, directed the Jury to find for the King on all the Issues, except those which regarded the Proclamations in the Market Towns near *Beauacre*; and on those to find for the Prisoner, which they did. And then the Court ordered that the Attorney General take nothing by his Prayer. And that the Prisoner be remanded to *Newgate*, in order to answer for the original Offence he standeth charged with in the Information taken by Mr. *Burdus*, if the Attorney General shall think fit to indict him for it.

N. B. THE Lord Chief Justice was absent by reason of Sicknes; but he afterwards declared that he entirely concurred with the other Judges in the Opinion they gave in this Case.

The Case of ÆNEAS MACDONALD, aliàs ANGUS
MACDONALD.

IN the Year 1747, a Bill of Indictment was found against him under the Special Commission in *Surry* for the Share he had in the late Rebellion. The Indictment ran in the same Form as those against the other Prisoners, without any Averment *that he was in Custody before the first of January 1746*. But the Council for the Crown were aware of the Exception taken in the Case of Mr. *Townly* and others, and that since the whole Proceeding against the Prisoner was subsequent to *January 1746*, the Answer then given would not serve the present Case. That Bill was therefore withdrawn before the Prisoner pleaded to it: And a new Bill concluding with an Averment *that he was apprehended and in Custody before the first of January 1746*, was preferred and found against him. On that Bill he was arraigned in *July 1747*, and his Trial came on the 10th of *December* following.

THE overt Acts charged in the Indictment were sufficiently proved. And also that the Prisoner was apprehended and in Custody before the first of *January 1746*.

THE Council for the Prisoner insisted that he was born in the Dominions of the *French King*, and on this Point they put his Defence.

BUT apprehending that the Weight of the Evidence might be against them, as indeed it was, with regard to the Place of the Prisoner's Birth, they endeavoured to captivate the Jury and Bystanders, by representing the great Hardship of a Prosecution of this Kind against a Person, who, admitting him to be a Native of *Great Britain*, had received his Education from his early Infancy in *France*; had spent his riper Years in a profitable Employment in that Kingdom, where all his Hopes centered. And speaking of the Doctrine of natural Allegiance, they represented it as a slavish Principle, not likely to prevail in these Times; especially as it seemed to derogate from the Principles of the Revolution.

HERE

Dyer. 298.
300.
1. Hale. 68.
96.

HERE the Court interposed and declared, that the mentioning the Case of the Prisoner as a Case any way similar to that of the Prisoner, supposing him to have been born in *Great Britain*, can serve no Purpose but to bring an *Odium* on that Great and Glorious Transaction. It never was doubted that a Subject born, taking a Commission from a foreign Prince and committing High Treason may be punished as a Subject for that Treason, notwithstanding his foreign Commission. It was so ruled in Doctor *Storey's* Case: And that Case was never yet denied to be Law. It is not in the Power of any private Subject to shake off his Allegiance, and to *transfer it to a foreign Prince*. Nor is it in the Power of any foreign Prince by naturalizing or employing a Subject of *Great Britain*, to dissolve the Bond of Allegiance between that Subject and the Crown.

HOWEVER as the Prisoner's Council had mentioned his *French* Commission as a Circumstance tending in their Opinion to prove his Birth in *France*, the Court permitted it to be read, the Attorney General consenting. It was dated the first of *June* 1745, and appointed the Prisoner Commissary of the Troops of *France*, which were then intended to embark for *Scotland*.

THE Court, with the Consent of the Council for the Crown, permitted the *Cartel* between *France* and *Great Britain* for the Exchange or Ransom of Prisoners likewise to be read. And observed, that as it relateth barely to the Exchange or Ransom of Prisoners of *War*, it can never extend to the Case of the Prisoner at the Bar, supposing him to be a Subject born. Because by the Laws of all Nations, Subjects taken in Arms against their lawful Prince, are not considered as Prisoners of War, but as Rebels; and are liable to the Punishments ordinarily inflicted on Rebels.

LORD Chief Justice *Lee* in his Direction to the Jury, told them that the overt Acts laid in the Indictment being fully proved, and not denied by the Prisoner, or rather admitted by his Defence, the only Fact they had to try was, whether he was a Native of *Great Britain*; if so, he must be found Guilty. And as to that Point, he said the Presumption in all Cases of this Kind is against the Prisoner; and the Proof of his Birth out of the King's Dominions, where the Prisoner putteth his Defence

Defence on that Issue, lieth upon *him*. But whether the Evidence that had been given in the present Case (which he summed up very minutely) did or did not amount to such Proof, he left to their Consideration.

THE Jury found him guilty, but recommended him to Mercy. He received Sentence of Death as in Cases of high Treason; But was afterwards pardoned upon the Conditions mentioned below.

Macdonald at the Suit of Ramsay.

WHILE Mr. *Macdonald* lay under Sentence of Death, a Creditor of his *Ramsay* obtained leave from my Lord Chief Justice at his Chambers to charge him in Custody of the Sheriff, in an Action for a considerable Sum of Money; and accordingly he was so charged.

IN *Easter* Term the 21st of Geo. 2^d. Mr. Attorney General acquainted the Court, that his Majesty had given Orders, for preparing a Pardon for Mr. *Macdonald* to pass the Great Seal, upon Condition of his retiring out of His Majesty's Dominions, and continuing abroad during his Life. And that one of the Secretaries of State had sent His Warrant to the Keeper of the *New Prison* to deliver Mr. *Macdonald* into the Custody of a Messenger; but that the Keeper refused to obey this Warrant, alledging that as his Prisoner stood charged in an Action at the Suit of Mr. *Ramsay*, he could not deliver him into the Custody of a Messenger without incurring the Danger of an Escape. Mr. Attorney concluded with a Motion that the Process Mr. *Macdonald* stood charged with at the Plaintiff's Suit might be discharged.

He was supported in this Motion by Sir *John Strange* and the Solicitor General. It was said by Mr. Attorney, but not strongly insisted on, that a Person under an Attainder is *Civiliter Mortuus*; his Person and Estate are absolutely at the Disposal of the Crown; and consequently he is not liable to civil Suits. And to this Purpose he cited *Trussell's Case*.

1. Leon. 326;
Cro. Eliz.

To this Point Mr. *Henley* and Mr. *Ford* for the Plaintiff insisted, and so the Court agreed, that the later Resolutions have been, and the Law hath been long settled, that an attainted Person is liable to civil Suits: but by the

213.

the Rules of the Court he ought not to be charged, without leave of the Court, or of a Judge at his Chambers.

THE Point reported by *Leonard* and *Croke* to have been adjudged in *Trussell's Case* came afterwards under Consideration in Actions brought by other Persons against * *that very Man*, and was ruled quite otherwise.

THE Point chiefly insisted on by the Council on the Side of the Motion was, that to charge the Defendant in this Case, so as to make his Person liable, would be a Means of defeating the King's Pardon; because he would be thereby disabled to comply with the Terms of it. It would be in Effect saying, that his Majesty shall not grant a Pardon on these Conditions, he shall Pardon absolutely or not at all.

To this Purpose they cited *Foxworthy's Case* reported in *Salk.* 500. 2. *L^d Raym.* 848. *Far.* 153. And the Case of *Coppin* and *Gunner* in 2. *L^d Raym.* 1572.

BUT the Court said, we cannot judicially take notice of His Majesty's Intentions touching the Pardon. The Crown in Case of Pardons, signifieth its Pleasure *finally* and *irrevocably* by the Great Seal, and by that alone. A Pardon may not pass at all, or it may be upon other Conditions than are suggested at the Bar, or it may be a free Pardon. And therefore 'till the Pardon is passed, it is too early for the Court to give any Opinion upon the main Question. Accordingly the Court gave no Opinion, and Mr. Attorney took nothing by his Motion. †

MR. *Macdonald* having afterwards made his Creditor Mr. *Ramsay* easy with regard to his Debt, the Action was withdrawn. And he was in *December* 1749, delivered into the Custody of a Messenger by Virtue of a Warrant for that Purpose from the Duke of *Newcastle*, One of His Majesty's Principal Secretaries of State.

N. B. THE Person of a Man under an Attainder is not absolutely at the Disposal of the Crown. It is so for the Ends of publick Justice, and for no other Purpose.

* *Co. Ent.* 246. a. b. *Cro. Eliz.* 516. *Co. Ent.* 248. 2. *And.* 38. *Moo.* 753. 3. *Inst.* 215.

† N. B. The Rule in *Foxworthy's Case* seems to have been overhasty, and the Reasons on which it is grounded appear to me to be inconclusive; that in *Coppin* and *Gunner* seems more equitable; since it secured to the Defendant the Benefit of his Pardon, without Prejudice to the Plaintiff, who might resort for Satisfaction to the Effects of the Defendant if he could find any.

The King may order Execution to be done upon him according to Law, notwithstanding he may be charged in Custody at the Suit of Creditors. But 'till Execution is done, his Creditors have an Interest in his Person for securing their Debts. And He himself as long as he liveth, is under the Protection of the Law. To kill him without Warrant of Law is Murder; for which the Murderer is liable to a Prosecution, at the Suit of the Crown, and likewise to an Appeal at the Suit of the Widow. For though his Heir is barred by the Attainder, which corrupteth his Blood, and dissolveth all Relations grounded on Consanguinity, yet the Relation grounded on the matrimonial Contract continueth 'till Death.

6. H. 4. 6. b.
7. a.
Crom. 113. a.

Bro. Appeal.

AND if a Person under an Attainder be beat or maimed, or a Woman in the like Circumstances ravished, they may, *after a Pardon*, maintain an Action or Appeal, as their Cases respectively may require. And though before a Pardon they are disabled to sue in their own Names, I make no Doubt that they are intitled to prosecute, according to the Nature of their respective Cases in the Name of the King; who will do equal Right to all his Subjects.

3. Inst. 215.

N. B. DURING the Trials of the Rebels at St. Margaret's Hill, Southwark, under the Commission of 1746, one of the Prisoners challenged peremptorily, and for Cause, so many of the Jurors, that there was not a sufficient Number left on the Pannel to proceed on his Trial: In that Case the Court *Ore tenus*, (for it was, as hath been already observed, a Commission of Gaol Delivery as well as of Oyer and Terminer) ordered a new Pannel, and adjourned for several Days. On the Day of Adjournment the Sheriff returned a Pannel of the same Jurors that had served through the whole Proceeding, those who had been challenged by the Prisoner, or sworn before, included. And a sufficient Number appearing, he was tried.

THE like Case happened on the Trial of one of the Assassins in King William's Time. Mr. Cook on the 9th of May challenged in the like Manner 'till the Jurors remaining on the Pannel were not sufficient to make a full Jury. Whereupon the Court *Ore tenus* ordered a new Pannel, and adjourned to the 14th. On that Day his Council insisted that a new Pannel ought not to have been

4. Trial. 728.
to 733.

f. 155.

been ordered; but that an *Habeas Corpora* with a *Tales* should have been awarded, according to the Opinion in *Stanford*. But the Court declared that this being a Proceeding under a Commission of Gaol Delivery as well as Oyer and Terminer, they might, and indeed always do in the like Case, award a new Pannel if necessary *Ore tenus*, without Writ or Precept.

IN a mere Commission of Oyer and Terminer no Pannel is ordered 'till the Defendant hath pleaded to Issue, and Issue is actually joined; and then it is done by Precept in the Nature of a *Venire*. And if in such Case there should be a Want of Jurors, an *Habeas Corpora* with a *Tales* may, said the Court, *possibly* issue; but no *Tales* can be granted upon a Commission of Gaol Delivery. And Mr. Justice *Powel* upon that Occasion said, that if the Sheriff had returned all new Men without Regard to those who appeared and were sworn or challenged on the 9th, it had been well enough.

THE Reason of the Adjournments in these Cases was that the Prisoners might have Copies of the new Pannels in due Time, pursuant to the 7th of King *William*; otherwise new Pannels might have been ordered returnable *instantér*.

THE original Pannel in 1746 was upon great Deliberation ordered, sitting the Court, *Ore tenus*, as under the Commission of Gaol Delivery; though, as I have already observed, a Precept in common Form for holding the Sessions had issued under the Seals of the three Chiefs and three senior Judges.

The Case of WILLIAM NICHOLAS, at the Bristol Gaol Delivery, April 4, 1748.

HE was Indicted for Petty Treason, in the Wilful Murder of *Anne* the Wife of Dr. *William Logan*, to whom he was a hired Servant.

IT appeared on the Trial that on the 13th of April 1747, the Prisoner *knowingly* and *wilfully* put a Quantity of white Arsnick into a Pot of Chocolate which was provided for his Master and Mistress, who both drank of it. It very soon appeared that they had taken Poison; and proper Means being used, the Doctor in some Time, with

with great Difficulty, got the better of the Disorder; but his Lady, who was of a more weakly Constitution, was never entirely free from the Effects of the Poison, which at length threw her into a lingering wasting Disorder, of which on the 31st January following she died.

BEFORE the * Recorder directed the Jury, † a Gentleman of the Bar desired to be heard as *Amicus Curiae*. * Mr. Justice Foster.
He submitted to the Court, Whether the Prisoner is not † Mr. Scudamore.
intituled to the Benefit of the Act of General Pardon passed more.
in the last Session; he admitted that the Offences of wilful Murder, petty-Treason, and wilful Poisoning are excepted; but submitted, that the General Pardon extended to all *Misdemeanors* committed before the 15th of 20. Geo. 2.
June 1747. That the Crime the Prisoner stands charged with, *viz.* the Administring the Poison, was committed on the 13th of *April* before; this Offence, 'till Death ensued, could be considered in no other Light than as a high Misdemeanor: It could be considered in no other Light at the Time the Act took place, and the Pardon operated upon it in that Light. And consequently the Homicide, which was but the Consequence of the Offence pardoned by the Statute, is likewise pardoned.

To this Purpose he cited and relied on 1. *Hales pl. Cor.* 426. "If a Man giveth another a Mortal Stroke" and he dieth thereof within a Year and a Day; but "Mesne between the Stroke and Death, there cometh a" General Pardon, whereby all Misdemeanors are pardoned; this doth pardon the Felony consequentially, "because the Act that is the Offence is pardoned, though" it be not a Felony 'till the Party die."

To this it was answered by the Recorder, that *Hale* in this Passage groundeth himself singly on the Authority of *Cole's Case*, in *Plowden*; *Crompton* lays down the Rule *Plowd.* 401.
much in the same Manner, and cites the same Authority *Crompt. Just.*
for it: And some other Authors have done the same. *tice of Peace*
But the Case as reported by *Plowden* doth by no means 116. pl. 20.
warrant the Rule in the Latitude now contended for.
Cole's Case is certainly good Law, but the Conclusion drawn from it by these Authors is expressed in Terms too general, and without a proper Guard; because in the Manner it is laid down by them it seemeth to imply,
E that

that every Degree of Homicide is within the Pardon which intervened betwixt the Stroke and Death ; at least it leaveth it in some Measure doubtful whether it is so or no.

13. Eliz. c.
28.

COLE'S Case was no more than this ; he was indicted before the Coroner for *Manſlaughter*, and the Indiſtment charged that he gave the Mortal Stroke on the 12th of *February* in the 13th Year of the Queen, and that the Party died of that Stroke on the 18th of *June* following. Upon his Arraignment he pleaded an Act of General Pardon, by which all Felonies, Offences, and Misdemeanors (not therein excepted) committed before and until the 14th Day of *February* in the 13th Year of the Queen were pardoned : with an Averment that neither he nor *the Offence laid in the Indiſtment* are within the Exceptions of the Act.

HAD the Indiſtment been for Murder as in the present Case it is, this Averment had been evidently false ; and consequently his Plea could not have been allowed : For Murder is expreſſy excepted, though Manſlaughter is not ; the only Doubt was, whether the General Pardon did reach his Case. Becauſe 'till the Death of the Party no Felony could be ſaid to have been committed by him ; and the Party dying after the Day on which the Act took place, it was doubted whether the Act could operate ſo as to *pardon a Felony which was not then compleated*.

THE Court took time to conſider ; and afterwards agreed that the Defendant was within the General Pardon. " Becauſe, ſaith the Book, the Stroke was the " Occaſion of the Felony ; the giving of which Stroke " was the Offence *and Misdemeanor againſt the Queen,* " *which is pardoned by the Act* ; and therefore every " thing enſuing from that Offence is likewiſe pardoned." Theſe Words, I own, are pretty general, and if they ſtood alone might beget ſome Doubt : But I think they are ſufficiently explained by the Case, and amount to no more than this, That the Felony having had its Commencement before the Pardon took place, *and being pardoned by the Act* (for Manſlaughter was pardoned) the Priſoner was intitled to the Benefit of the Pardon, though the Felony was not compleated by the Death of the Party 'till after the Act ; that the Pardon ſhould Operate in *favour* of the Priſoner, in the ſame manner

as it would have done if the Felony had been compleat before the Act, and in no other manner.

THERE is a like Case in *Dyer* where the Point is left Dy. 99. pl. undetermined, but the Book saith expressly that the Indictment was *de Morte hominis, sed non ex Malitiâ præcogitatâ, sive per Murdrum.* 65.

BUT how will these Cases affect the Prisoner at the Bar? The Court in *Cole's Case* carried back the Felony by Relation to the Time of the Stroke, in order to intitle him to the Benefit of the Pardon; for the Felony, *had it been compleated before the Act*, was pardoned by the Act; but in this Case, the Prisoner cannot possibly avail himself of any such Relation, since the Crime he stands charged with is expressly excepted.

BESIDES, could he have pleaded the Act in case it had been necessary for him to have pleaded it? he could not. For while the special Pleading of a Statute Pardon, in which there were Exceptions of Persons and Crimes, was necessary, it was always incumbent on the Party to aver that neither he, nor *the Offence laid in the Indictment* are within the Exceptions of the Act. This the Prisoner at the Bar could not have done; and consequently he could not have been intitled to the Benefit of this Act. And though the Act now under consideration, hath dispensed with this manner of Pleading, and given the Party the Benefit of the Pardon on Evidence upon the general Issue, yet still if it appeareth to the Court, either that the Party is excepted by name, or that the Offence charged on him is excepted, the Court cannot give him the benefit of the Pardon.

PERSONS intended to be pardoned had been put to great Difficulties in pleading Specially: they had failed in Point of Form, or in Point of Time, or in some other Circumstances necessary to render their Plea available to them: to ease them of these Difficulties, and *for that Purpose only*, all the Acts of general Pardon since the Restoration, have taken away the necessity of special Pleading. But the Law in other respects standeth just as it did before; the Facts which formerly were to be specially pleaded, must now appear upon Evidence to be true, otherwise the Party cannot have the Benefit of the Act.

THE Jury found the Prisoner guilty. And he had Judgment of Death as in Cases of petty Treason, and was accordingly executed.

- N. B.* SOME learned Men seem to have been under a Difficulty to account for the true grounds of the Stat. 1. E. 6. c. 12. which enacteth "That from *benceforth* wilful Poisoning shall be deemed wilful Murder of Malice prepensed; and that the Offenders shall suffer as in other Cases of wilful Murder of Malice prepensed."
11. Co. 32. a. LORD Chief Justice *Coke* is of Opinion that this Provision in the Statute was a needless Caution; since wilful Poisoning was undoubtedly Murder of Malice prepense, and *as such*, saith he, was ousted by the 23^d and 25th H. 8.
- Kel. 52. LORD Chief Justice *Kelyng* upon the Authority of Justice *Jones*, saith that the Statute of 1. E. 6. was but declaratory of the Common Law, and an Affirmation of it.
- Kel. 125. LORD *Holt* accounteth for this Act another way and assigneth two Reasons; first, killing by Poison did not come under *Braetton's* Definition, *Manu hominum perpetrata*; but what doth *Braetton* mean by *Manu hominum*, or as he expresseth himself in a parallel Place, *Occisio ab Homine facta*? His own words will best explain his meaning, "*Etest Homicidium, occisio ab Homine facta*, si enim a Bove, Cane, vel aliâ Re, non dicitur propriè Homicidium." And in the Chapter cited by his Lordship, "*Item a manu Hominum, dicitur, ad differentiam eorum qui a Bestiis Occiduntur,*"—"vel qui mortui sunt per infortunium." He plainly meaneth Homicide by the intervention of human means, nothing more.
- Lib. 3. c. 4. "enim a Bove, Cane, vel aliâ Re, non dicitur propriè Homicidium." And in the Chapter cited by his Lordship, "Item a manu Hominum, dicitur, ad differentiam eorum qui a Bestiis Occiduntur,"—"vel qui mortui sunt per infortunium." He plainly meaneth Homicide by the intervention of human means, nothing more.
- C. 15. S. 4. "mortui sunt per infortunium." He plainly meaneth Homicide by the intervention of human means, nothing more.

HIS Lordship's second Reason is, that wilful Poisoning did not come under the words of 13. R. 2. The Words of the act are, "murdered or slain by await, assault, or malice prepensed." It might not in strictness of Speech come under the Words *await*, or *assault*; but certainly, a Man who is wilfully poisoned, is murdered of Malice prepensed.

I believe it never was doubted, whether wilful Poisoning, the most deliberate, insidious, and hateful Offence against the Life of Man, and at the same time the most easily perpetrated, was a capital Offence at common Law.

All the antient Authors speak of it as a Species of wilful, felonious Homicide. *Bracton* particularly in the Places cited in part by Lord *Holt*, speaketh of it in that light; and *Fleta* saith that in his time Men were drawn and hanged, and Women burnt for it. L. 3. c. 4. &c. c. 18. S. 5. L. 1. c. 37.

I take the true Ground of the Statute of the 1. E. 6. to be this; the 22. H. 8. had made wilful Poisoning high Treason, and had expressly excluded the Offenders from Clergy, and directed that they should be boiled to Death. The 1. E. 6. reduced all Treasons to the antient Standard of the 25. E. 3. This was a virtual Repeal of the 22. H. 8. and so in the Judgment of the Parliament it became necessary to make some new Provision for the Case of wilful Poisoning, which undoubtedly deserved a capital Punishment; accordingly by the 10th Section of the Act, the Offenders are ousted of Clergy. And the 13th enacteth, not in *Affirmance* of the common Law as *Kelyng* supposeth, but by way of *Revival* of it, that the Offence shall from thenceforth be deemed wilful Murder of Malice prepensed, and that the Offenders shall suffer and forfeit as in other Cases of wilful Murder of Malice prepensed. 22. H. 8. c. 9. C. 12. S. 2.

THE taking away Clergy by express Words, which is done by the 10th Section, was in my opinion, though *Coke* thinketh otherwise, absolutely necessary; because the Statutes, which ousted Clergy in the Case of wilful Murder, were made while the Offence of wilful Poisoning did not fall under the Denomination of Murder, but of high Treason, in which the Crime of Murder was merged: And consequently, those Statutes could not reach the Offence of wilful Poisoning; and though perhaps the bare Repeal of the Statute which made the Offence high Treason, might have reduced it to the rank it stood in at Common Law, it was however thought most advisable to do it by an express Provision, which is done by the 13th Section. 23. and 25, H. 8. Dyer. 50. 6. R. 13. b.

THE Parliament of the 7th of Queen *Anne* plainly proceeded upon the same cautious Principle, in a Case exactly similar to this; I mean with regard to certain capital Offences, which by the Law of *Scotland* were deemed high Treason there. 7. An. c. 21.

THE first Section enacteth that, after the first of July 1709, no Offences shall be high Treason or Misprision of

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high Treason within *Scotland*, but those that are high Treason or Misprision of high Treason in *England*; and the seventh Section, reciting that the Offences therein enumerated, had been by several Acts of Parliament in *Scotland* declared to be high Treason, but that after the said first of *July* the *aforesaid Acts of Parliament* will have no Force or Effect, enacteth, that those Offences shall after the said first Day of *July* be deemed capital Offences; and that the Offenders therein shall suffer and be tried in the same Manner as by the Laws of *Scotland* is provided in the case of other capital Crimes.

The Case of WILLIAM YORK.

AT Bury Summer Assizes 1748, *William York*, a Boy of ten years of Age, was convicted before Lord Chief Justice *Willes* for the murder of a Girl of about five years of Age, and received sentence of Death. But the Chief Justice, out of regard to the tender Years of the Prisoner, respited Execution, 'till he should have an opportunity of taking the Opinion of the rest of the Judges, whether it was proper to execute him or not, upon the special Circumstances of the Case; which he reported to the Judges at *Serjeants Inn* in *Michaelmas* Term following.

THE Boy and Girl were Parish Children, put under the Care of a Parishioner, at whose House they were lodged and maintained; on the Day the Murder happened, the Man of the House and his Wife went out to their Work early in the Morning, and left the Children in Bed together; when they returned from work, the Girl was missing; and the Boy being asked what was become of her, answered, that he had helped her up and put on her Cloaths, and that she was gone he knew not whither. Upon this, strict search was made in the Ditches and Pools of Water near the House, from an apprehension that the Child might have fallen into the Water. During this search, the Man under whose care the Children were, observed that a Heap of Dung near the House had been newly turned up; and upon removing the upper part of the Heap, he found the Body of the

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the Child about a Foot's depth under the Surface, cut and mangled in a most barbarous and horrid manner.

UPON this Discovery, the Boy, who was the only Person capable of committing the Fact, that was left at home with the Child, was charged with the Fact, which he stiffly denied.

WHEN the Coroner's Jury met, the Boy was again charged, but persisted still to deny the Fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole Truth. He then said that the Child had been used to foul herself in Bed; that she did so that Morning (which was not true, for the Bed was searched and found to be clean) that thereupon he took her out of the Bed, and carried her to the Dung Heap; and with a large Knife, which he found about the House, cut her in the manner the Body appeared to be mangled, and buried her in the Dung Heap; placing the Dung and Straw that was bloody under the Body, and covering it up with what was clean; and having so done, he got Water and washed himself as clean as he could.

THE Boy was the next Morning carried before a neighbouring Justice of the Peace, before whom he repeated his Confession, with all the Circumstances he had related to the Coroner and his Jury. The Justice of the Peace very prudently deferred proceeding to a Commitment, 'till the Boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the Fact he stood charged with, and admonished him not to wrong himself. And then ordered him into a Room, where none of the Crowd that attended should have access to him.

WHEN the Boy had been some Hours in this Room, where Victuals and Drink were provided for him, he was brought a second Time before the Justice, and then he repeated his former Confession: Upon which he was committed to Gaol.

ON the Trial, Evidence was given of the Declarations before mentioned to have been made before the Coroner and his Jury, and before the Justice of the Peace; and of many Declarations to the same Purpose which the Boy made to other People after he came to Gaol, and even

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down to the Day of his Trial. For he constantly told the same Story in substance, commonly adding that the Devil put him upon committing the Fact. Upon this Evidence, with some other Circumstances tending to corroborate the Confessions, he was convicted.

UPON this Report of the Chief Justice, the Judges having taken time to consider of it, unanimously agreed, 1st, THAT the Declarations stated in the Report were Evidence proper to be left to the Jury.

2dly, THAT supposing the Boy to have been guilty of this Fact, there are so many Circumstances stated in the Report, which are undoubtedly tokens of what my Lord Chief Justice *Hale* somewhere calleth a *Mischievous Discretion*, that he is certainly a proper Subject for capital Punishment, and ought to suffer; for it would be of very dangerous Consequence to have it thought, that Children may commit such atrocious Crimes with Impunity.

THERE are many Crimes of the most heinous Nature, such as in the present Case the murder of young Children, poisoning Parents or Masters, burning Houses, &c. which Children are very capable of committing; and which they may in some Circumstances be under strong Temptations to commit; and therefore, though the taking away the Life of a Boy of ten Years old may savour of Cruelty, yet as the Example of this Boy's punishment may be a means of deterring other Children from the like Offences; and as the sparing this Boy, *merely on Account of his Age*, will probably have a quite contrary Tendency, in Justice to the Publick, the Law ought to take it's Course; unless there remaineth any Doubt touching his Guilt.

IN this general Principle all the Judges concurred. But two or three of them, out of great Tenderness and Caution advised the Chief Justice to send another Reprieve for the Prisoner: suggesting that it might possibly appear on further inquiry, that the Boy had taken this Matter upon himself at the Instigation of some Person or other, who hoped by this Artifice to screen the real Offender from Justice.

ACCORDINGLY the Chief Justice did grant one or two more Reprieves; and desired the Justice of the Peace who took the Boy's Examination, and also some other

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Persons in whose Prudence he could confide, to make the strictest Enquiry they could into the Affair, and report to him; at length he, receiving no further light, determined to send no more Reprieves, and to leave the Prisoner to the Justice of the Law at the Expiration of the last; but before the Expiration of that Reprieve, Execution was respited 'till further Order, by Warrant from one of the Secretaries of State. And at the Summer Assizes 1757 he had the Benefit of His Majesty's Pardon, upon Condition of his entering immediately into the Sea Service.

The Case of ABRAHAM EVANS.

AT the Sessions at the *Old Baily* in *May* 1749, *John Avery* and *Abraham Evans* were indicted, *Avery* for privately stealing from the Person of *Sir Giles Payne*, one Silk Handkerchief, Value 12^d; and *Evans* for feloniously receiving the same, knowing it to be stolen.

AVERY was found guilty to the Value of 10^d, and was ordered to be transported for seven Years. *Evans* was likewise convicted of receiving the Goods knowing them to be stolen; but Judgment was respited as to him, upon a doubt whether sentence of Transportation for fourteen Years can be given against him upon the Statute of 4th Geo. 1. in regard the principal Felon is found guilty of Petty Larceny only.

IN *Michaelmas* Vacation following the Judges met at *Serjeants Inn* to consider of this doubt; and they agreed, *Una Voce*, that no Judgment can be given against *Evans* on this Verdict on the 4. Geo. 1.

FOR though that Act is express, *that Persons convicted of buying or receiving stolen Goods, knowing them to be stolen, shall be transported for fourteen Years*, yet still, it must mean Persons *legally* convicted; Persons convicted as Accessaries after the Fact under the Statutes of 3. 4. W. and M. and 5. A. But this Man ought to have been acquitted, the principal Felon being convicted of Petty Larceny only; and indeed the Indictment against *Avery* being for Petty Larceny, *Evans* ought not to have been put upon his Trial. For the Acts which make Receivers
of

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of stolen Goods knowingly, accessaries to the Felony, must be understood to make them Accessaries in such Cases only where by Law an Accessary may be; and there can be no Accessary to Petty Larceny.

Accordingly, at the next Sessions, *Evans* was discharged.

AT the *Old Bayly* Sessions in *April* 1750, one Mr. *Clarke* was brought to his Trial, and it being a Case of great expectation, the Court and all the Passages to it were extreamly crowded; the Weather too was hotter than is usual at that Time of the Year.

MANY People who were in Court at this time, were sensibly affected with a very noisome Smell; and it appeared soon afterwards, upon an Inquiry ordered by the Court of Aldermen, that the whole Prison of *Newgate*, and all the Passages leading thence into the Court, were in a very filthy Condition, and had long been so.

WHAT made these Circumstances to be at all attended to was, that within a Week or ten Days at most after the Session, many People who were present at Mr. *Clarke's* Trial, were seized with a Fever of the malignant Kind; and few who were seized, recovered.

THE Symptoms were much alike in all the Patients; and in less than six Weeks time the Distemper entirely ceased.

It was remarked by some, and I mention it because the same *Remark hath been formerly made on a like Occasion, that Women were very little affected; I did not hear of more than one Woman who took the Fever in Court, though doubtless many Women were there.

It ought to be remembered that at the time this Distemper happened, there was no sickness in the Gaol more than is common in such Places; this Circumstance, which distinguisheth this from most of the Cases of the like Kind which we have heard of, suggesteth a very proper Caution: *Not to presume too far upon the Health of the Gaol, barely because the Gaol-Fever is not among the Prisoners.*

* *Camb. Eliz. sub. An. 1577. Gilpin's Life p. 140.*

FOR without doubt, if the Points of Cleanliness and free Air have been greatly neglected, the putrid *Effluvia* which the Prisoners bring with them in their Cloaths, &c. especially where too many are brought into a crowded Court together, may have fatal Effects on People who are accustomed to breathe better Air; though the poor Wretches, who are in some measure habituated to the Fumes of a Prison, may not always be sensible of any great Inconvenience from them.

THE Persons of chief Note who were in Court at this time and died of the Fever were, Sir *Samuel Pen-
nant* Lord Mayor for that Year, Sir *Thomas Abney* one of the Justices of the Common Pleas, *Charles Clarke*, Esquire one of the Barons of the Exchequer, and Sir *Daniel Lambert*, one of the Aldermen of London. Of less note, a Gentleman of the Bar, two or three Students, one of the Undersheriffs, an Officer of Lord Chief Justice *Lee*, who attended his Lordship in Court at that time, several of the Jury on the *Middlesex* Side, and about forty other Persons whom Business or Curiosity had brought thither.

MR. Justice *Abney*, of whom I can speak from a long and intimate Acquaintance with him, was a very worthy Man, learned in his Profession, and of great Integrity.

HIS Zeal for the Interest of his Country, which he well understood, begat in him a strong and early Attachment to his Majesty and his royal House; which was, if I may be allowed the Expression, his *ruling Passion* to the Day of his Death.

HE was, through an openness of Temper, or the Pride of Virtue habitual to him, incapable of recommending himself by that kind of low assiduous Craft, by which we have known some unworthy Men make their way to the Favour of the Great.

HOWEVER, his Merit was not overlooked. He was first appointed Attorney General of the *Dutchy* and one of his Majesty's learned Council; then Steward of the Palace Court; afterwards a Baron of the Exchequer; and last of all, one of the Justices of the Court of Common Pleas.

IN his judicial Capacity he constantly paid a religious regard to the merits of the Question, in the light the Case appeared

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appeared to him : and his Judgment very seldom misled him.

IN short, when he died, the World lost a very valuable Man, his Majesty an excellent Subject, and the Publick a faithful able Servant.

Nec Me meminisse pigebit.

The Case of ELIZABETH MEADOW.

AT *Newgate Sessions* in *January 1750*, present Lord Chief Baron *Parker*, Mr. Justice *Foster*, and Mr. Justice *Birch*, *Elizabeth Meadow* was brought upon her Trial for stealing out of a dwelling House to the Value of 40s. and upwards.

WHILE the Prosecutor was giving his Evidence, it was observed that the Prisoner was extremely discomposed, frequently fainting and screaming out as in great Pain; and some of the Jury doubting whether she had not the Pains of Labour on her, the Court desired two Matron-like Women to go to the Bar to her: and they desiring she might be removed into a private Room, it was immediately ordered, and the Women went with her. One of them soon afterwards returned, and being sworn, declared, that according to the best of her Judgment, and she had born twelve Children herself, the Prisoner had the Pains of Labour upon her, though much before her Time. The Court thereupon ordered her back to *Newgate*, and that proper Care should be taken of her there; and discharged the Jury of her.

JOHN NUTBROWN's Case.

AT the same Sessions *John Nutbrown* and *Miles Nutbrown* were indicted for Burglary in the dwelling House of one Mr. *Fakney* at *Hackney*, and stealing divers Goods. It appeared by Mr. *Fakney's* Evidence that he held this House for a Term of Years which is not yet expired, and made use of it as a Country House in the Summer, his chief Residence being in *London*. That about the latter

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End of the last Summer, he removed with his whole Family to his House in the City, and brought away a considerable Part of his Goods: That in *November* last his House was broke open and in part rifled; upon which he removed the Remainder of his Household Furniture, except a Clock, and a few old Bedsteads, and some Lumber of very little Value; leaving no Bed or Kitchen Furniture, or any thing else for the Accommodation of a Family. Mr. *Fakney* being asked whether at the Time he so disfurnished his House he had any Intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the House, and to let it for the Remainder of his Term.

THE Fa& the Prisoners were charged with was sufficiently proved; and was committed about Midnight the first of *January* last.

THE Court was of Opinion, that the Prosecutor having left his House, and disfurnished it in the manner before mentioned, without any settled Resolution of returning, but rather inclining to the contrary, it could not, under these Circumstances, be deemed *his* dwelling House at the Time the Fa& was committed. And accordingly directed the Jury to acquit the Prisoners of the Burglary, which they did; but found them guilty of Felony in stealing the Clock and some other small matters. And they were ordered for transportation.

N. B. WHERE the Owner quitteth the House, *Animo Revertendi*, it may still be considered as his Mansion House, though no Person be left in it; many Citizens, and some Lawyers, do so from a Principle of good Husbandry in the Summer or for a long Vacation. See *Pop. 42. 52. 4. Co. 40.* and MSS. *Denton and Chapple*. A Case upon a Burglary in the House of Mr. *Nichols*, *Easter* Sessions 10. *W. 3.* But there must be an Intention of returning, otherwise it will not be Burglary.

JOHN HOWARD's Case.

AT the Old Bayly, *July 3. 1751*, present Lord Chief Baron *Parker*, Mr. Justice *Foster*, and Mr. Justice *Birch*, *John Howard* was indicted on the Statute for privately 10. 11. W. 3.
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vately stealing Goods the Property of Mess. *Fludyer* and Co. in the *Warehouse of John Day*. There was another Count in the Indictment, charging that the Prisoner stole the Goods of *John Day* in his Warehouse.

THE Case upon Evidence appeared to be, that *John Day* kept a Common Warehouse by the Water-side, where Merchants did usually lodge Goods intended for Exportation, 'till they could have an Opportunity of putting them on board. The Goods in the Indictment were sent by *Fludyer* and Co. to this Warehouse in order to be put on board a Vessel bound for , and were stolen by the Prisoner in this Warehouse.

THE Court was of Opinion that this is not a Case within the Statute. For by the Word *Warehouses* in the Statute is meant, not mere Repositories for Goods, but such Places where Merchants and other Traders keep their Goods for Sale in the nature of Shops, and whither Customers go to view them. And though the Goods in this Case might with Propriety enough be laid to be the Goods of *John Day*, as they are in the second Count, since he had the Charge and Possession of them which made him answerable to his Principals for them ; yet still the same Objection recurrerth, his Warehouse was not a Place for Sale, but meerly safe Custody.

ACCORDINGLY the Larceny being fully proved, the Prisoner was by the Direction of the Court found guilty of Larceny, to the Value laid in the Indictment, and acquitted of stealing privately in the Warehouse.

N. B. IT hath been generally held, and I think very rightly, that the meaning of this Act with regard to Shoplifting is, that the Goods &c. must be such as are usually exposed to Sale in the Shop, not any other valuable Thing which may happen to be put there. And I think the same equitable Construction should take place with regard to Warehouses. The Goods should be such as are usually exposed to Sale in such Places.

AND though Coachhouses and Stables, which are likewise named in the Act, are not Places for Sale; yet still in the Construction of so Penal a Law, I think it will not be amiss to carry the same Equity as far as may be with regard to

to them. The Goods should be such as are usually lodged in those Places.

BUT it hath been very rightly held, that Money is not within the Act with regard to any of the Places mentioned in it, the Words being *Goods, Wares and Merchandizes*. For although the Word *Goods* may in a large Sense take in Money and often doth, yet being connected with *Wares and Merchandizes*, the safer Construction of so penal a Statute will be, to confine it to Goods *ejusdem generis*, Goods *exposed to Sale*.*

AND if it shall appear on the Evidence, as it often doth, that those Places were broke open at the Time of the Larceny, the Case will not, in my Opinion, come within the Act. For the Words are, if any Person shall *privately* steal, which seemeth to exclude all Cases, where any degree of Force is used to come at the Goods.

The Case of ALEXANDER Lord PITSLIGO, in the House of Lords.

BY an Act passed in the 19th of Geo. 2. reciting, that *Alexander Lord Pitsligo* and other Persons therein named, had been in actual Rebellion, and were fled from Justice, it is enacted that the said *Alexander Lord Pitsligo* &c. &c. shall stand attainted of high Treason, unless they surrender themselves to Justice on or before the 12th Day of July 1746. 19. Geo. 2. c. 26.

LORD *Pitsligo* did not surrender in Obedience to the Act. And thereupon his Lands in *Scotland* were surveyed and seized for the use of his Majesty by Order of the Court of Exchequer in *Scotland*, pursuant to the Act of the 20th of Geo. 2. upon a Presumption that he stood Attainted by the Act of the 19th. His Lordship in due time, pursuant to the last mentioned Act, put in his Claim to the Lands in the Court of Session, by the 20. Geo. 2. c. 41.

* In like manner ruled upon the same Principle, at *Maidstone*, Lent Assizes 1752, in the Case of *George Grimes*, indicted on the Statute 24. Geo. 2. c. 45. for stealing a considerable Sum of Money out of a Ship in Port. Though great Part of it consisted in *Portugal* Money, not made current by Proclamation, but commonly current.

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Name of *Alexander Lord Forbes of Pitsligo*; setting forth that his Ancestor was, by Letters Patent bearing Date the 24th of *June* 1633, enobled, and created a Baron of *Scotland* by the Name Stile and Title of *Lord Forbes of Pitsligo*, which Title is now descended on him. And insisted that he is not named in the A& of Attainder; and consequently doth not stand attainted; nor are his Lands subje& to forfeiture.

To this Claim the King's Advocate put in an Answer, by which he admitted the Patent of Creation as stated in the Claim; but insisted, that the Claimant is the Person meant and sufficiently described by the A&. In proof whereof he alledged, that his Lordship and his Ancestors have been most commonly named and described by the Title of *Lord Pitsligo*: Particularly in A&s of Parliament, Rolls, and Minutes of Parliament, judicial Proceedings and Family Settlements. All which was made out in Proof, or admitted by his Lordship's Council.

THE Cause coming on to be heard in the Court of Session, their Lordships pronounced their Interlocutor, by which they find, That the said *Alexander Lord Forbes of Pitsligo* is not attainted by the A& of the 19th of Geo. 2. and therefore sustain his Claim, and decree Possession to be delivered to him.

FROM this Interlocutor his Majesty's Advocate in behalf of his Majesty appealed; and the Cause came to hearing in *January* 1750.

THE Lords sat several Days upon it: The Facts stated in the Case on either side were made out in Proof, or admitted at the Bar: and a great deal was said by the Council on both sides on the Doctrine of Misnomer, improper Addition, and the want of Addition in judicial Proceedings; and how far defects of that Kind may or may not be aided. But the true Point was thought to lie in a much narrower Compass, viz. whether the Respondent is the Person named in the A& of the 19th of Geo. 2. and whether he be sufficiently described by the Name and Title of *Alexander Lord Pitsligo*.

IT was insisted on by his Lordship's Council, that though the Legislature in describing Persons or Things is not bound by the strict Rules of Law, by which all judicial Proceedings are governed; yet in an A& so penal as

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that which is the Subject of the present Question, the Persons who are the Objects of it ought to be described by their proper Names ; so that one Man may not suffer for the Act or Default of another.

It is admitted, that the Ancestor of this Lord was enobled by the Name, Stile and Title of Lord *Forbes of Pitfargo*, and that this Title is descended on him. This Title therefore is his proper legal Name and no other ; for Titles of Dignity have been always held to be Parcel of the Name.

A Mistake in the Christian Name in an Act of the like Kind hath been adjudged in the House to be fatal : though every Body knew who was intended by the Act, and every part of the Description exactly suited that Person, and no Body else.

It was a Case on the Act of the first of Geo. 1st. which enacted, that if Major General *Thomas Gordon Laird* of *Achintoule* and other Persons therein named, should not surrender by a certain Day they should stand attainted. The Name of the Major General, who indeed was *Laird* of *Achintoule*, and was intended by the Act was *Alexander*, and not *Thomas*. And the single Point in Judgment in the Case was, whether Major General *Alexander Gordon Laird* of *Achintoule* was attainted by the Act.

THE Court of Session in *Scotland* adjudged that he was not ; and upon an Appeal to this House by the Commissioners for forfeited Estates, the opinion of all the Judges was taken upon this Question.*

WHETHER, if Major General *Alexander Gordon Laird* of *Achintoule* had been brought to the King's Bench Bar and Execution prayed against him, the Court would have awarded Execution ? and the Judges having conferred together, the Lord Chief Justice of the Court of King's Bench delivered their Opinion, that the said Court could not award Execution against *Alexander* ; because in awarding Execution they must pursue the Act of Parliament on which the Judgment is founded. And thereupon the decree of the Court of Sessions was affirmed.

* The Question and Answer of the Judges are here copied from the Journal. Mr. *Peer Williams's* Report of the Judges Answer is not correct. He is mistaken too in saying that it was an Appeal from a Judgment of the Commissioners for forfeited Estates. It was an Appeal from a Decree of the Court of Session grounded on the Act 5. Geo. 1. c. 22. S. 7. 8.

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THE like Judgment was soon afterwards given by the House in the Case of *Patrick Farquarson*, who was intended to be attainted by the same Act, but was therein by mistake called *Alexander Farquarson*.

21. Ed. 4. fo.
72. a.

A Mistake in an Act of Attainder with regard to a name of Dignity, which is the present Case, hath been likewise held to be fatal. It was in the Case of *Thomas Ormond*, who being no Knight, was attainted by Act of Parliament by the name of *Thomas Ormond, Knight*. And it was held he lost nothing by the Attainder, and that the Act as to him was void. For, saith the book, it cannot be intended that he was the Person attainted, since the Word *Knight* is part of the Name: and *Thomas Ormond* could well say that there is no such Person as *Thomas Ormond, Knight*, in *Rerum Naturâ*.*

HAD the Respondent been taken after the time limited for his surrender, he could not have pleaded any thing in bar of Execution besides a Misnomer, which he could have verified by his Patent of Creation; and in that case Execution could not have been awarded against him, consequently he ought now to have the Benefit of the same Plea.

OR had he been pardoned by the Name of Lord *Pitfligo*, and afterwards indicted by the Name of *Lord Forbes of Pitfligo*, that Pardon would not have availed him. And it would sound extremely harsh to say, that an Act of Attainder shall receive a more liberal Construction than a Charter of Pardon; or that the same Designation of the Person shall in one Case be sufficient to destroy him, which in another would not be sufficient to save him.

Mr. Attorney.
Mr. Solicitor.

THE Council for the Crown insisted that the whole is reducible to two Questions: whether the Respondent is the Person intended to be attainted? and if so, whether he is described with sufficient Certainty?

Cotton's Records 670.
671. N^o 20.
and 690. N^o 27.

* It was observed by the Solicitor General, that there is no original Report of this Case extant: it is cited in the Year Book by one of the Judges in his Argument on another Case. And there is room to doubt whether it did ever really come in Judgment, or was not rather a Case put by the Judge by way of Illustration. For *Thomas Ormond, Knight*, was attainted by Act of Parliament in the 1. of *Edw. 4th*, and in the 12. *Edw. 4th* the Attainder was reversed by Parliament, so that probably the Case never came in Judgment elsewhere. However, as the other Judges admitted the Case to be good Law, the Book is an authority to the Purpose for which it was cited by the Council for the Respondent.

THE Legislature is not confined to any precise forms of Expression, if their meaning appeareth with sufficient Certainty; that, and that alone is the true Rule of Construction in all Cases whatsoever.

WITH regard to Acts of Attainder, and Acts of the like Kind with that which is the Subject of the present Debate, much greater Latitude hath in all Ages been taken in describing the Persons intended, than is complained of in the present Case; and yet those Acts have had their full effect on the Persons and Estates of those who have been the Objects of them. But if the present Objection should prevail, those Attainders, and all Purchases made under them, would be shaken at once.

IN the Act for the Attainder of Queen *Katharine Howard* and her Accomplices, the Lady *Rochford*, who was the Widow of the Viscount *Rochford*, who had been formerly attainted and suffered for high Treason, is frequently named, sometimes by the Stile of the Lady *Jane Rochford*, at other times by the Title of *Jane Lady Rochford*, and is attainted. Neither of these Titles was in strictness due to her; and yet by both, different as they are, she is described in the Act. 33. H. 8. c. 21.

IN the same Act, the Lord *William Howard*, who was one of the Sons of the Duke of *Norfolk*, and the Lady *Katharine Howard* his Wife, are attainted of Misprision of Treason, by no other Description than Lord *William's* courtesy Title.

IN the Act of Oblivion, Sir *Hardress Waller*, Sir *Michael Livesy*, Sir *James Harrington*, Sir *Henry Mildmay*, Sir *Arthur Haslerig*, and Sir *Henry Vane*, among others, are excepted, without any sort of Notice whether they were Knights or Baronets, or of what Order of Knighthood they were. 12. Car. 2. c. 11. S. 34. 39. 40. 42.

BY an Act of the same Session, Sir *Michael Livesy*, by the same general uncertain Designation, is, among others, attainted of high Treason; and his Estate and the Estate of Sir *Hardress Waller*, by the same uncertain Description of their Persons, are vested in the King without Office. c. 30.

BY an Act in the next Session, the real and personal Estates of Sir *John Danvers*, Sir *John Bouchier*, Sir *Henry Mildmay*, Sir *James Harrington*, and Sir *Arthur Haslerig*, 13. Car. 2. c. 15. S. 2.

among others, by the same general uncertain Designation of their Persons, are vested in the Crown without Office.

S. 4. 5.

AND by the same Act Sir *Henry Mildmay* and Sir *James Harrington*, among others, by the same uncertain Description are degraded, and ordered to be drawn upon Sledges through the Streets of *London* to *Tyburn* with ropes about their Necks, and afterwards to be imprisoned for Life.

8. W. 3. c. 5.

By an Act passed soon after the Assassination Plot, *Johnson* aliàs *Harrison*, *Durant* aliàs *Durance*, *Byerly* *Plowden* and *Hungate*, (Blanks being left for their Christian Names) are among others required, as in the present Case, to surrender by a Day therein named, and in default thereof are attainted of high Treason.

1. Geo. 1. c.
42.

By an Act in the Time of Geo. 1st. made upon the like Occasion with the present Act, Sir *David Trepland*, Sir *Hugh Paterfon*, Sir *Donald Macdonald*, Sir *John Preston*, and Sir *John Mackenzie*, without Notice whether Knights or Baronets or of what Order of Knighthood, are among others, required as in the present Case, to surrender by a Day therein named, and in Default thereof are attainted of high Treason.

By these Instances it appeareth to a Demonstration that the Legislature never thought itself confined to the strict rules of Law in describing Persons whom it made the Objects of Punishment. It was sufficient that the Terms made use of were descriptive of the Persons intended to be punished: it never was doubted whether the Regicides who are attainted or otherwise subjected to Pains and Penalties by the Acts just now cited, were properly described; or whether their Estates vested in the Crown, though the very same Objection might have been made in their Cases as in the present, *That their full Title of Dignity was not set forth*, 'tis plain they were Men of some Dignity, Knights or Baronets; and it must be admitted that all Titles of Dignity, the lowest as well as the highest, are parcel of the Name, and that in all judicial Proceedings the Omission of even the lowest Dignity would be fatal. The same may be said with regard to those who were attainted by the Act of the first of Geo. 1st.

AND

AND with regard to those concerned in the Assassination Plot, they are described meerly by their Surnames ; and yet that Description was thought sufficient to reach them.

THESE were all in strictness of Law incomplete Descriptions of the Persons, yet they were never yet said to be insufficient in the Case of a parliamentary Attainder. And what is there in the present Case that distinguisheth it from those ? let it be admitted for Argument's Sake that Lord *Pitfigo* is imperfectly described, that his full Title of Creation is not set forth in the Act : but let it be admitted too that he is described by his Christian Name, by his Dignity (Lord) and by his Barony ; by the Title by which he is most commonly known, by which his Ancestors were frequently named in Acts of Parliament, in the Rolls of Parliament, in their family Settlements, and in judicial Proceedings : and which he hath used in Deeds executed by himself, and in his own Letters, some of which have been read ; let this be admitted, we have it all in proof, and then let any Man find out the least distinction in favour of his Lordship between those Cases and the present, if he can.

THREE Cases have been cited by the Council on the other side, those of *Alexander Gordon*, *Patrick Farquarson*, and *Thomas Ormond*, and one Answer will go to all of them. They do not reach the present Case. The present Question is upon an *incomplete* Description of the Person, but a Description not *repugnant to Truth* ; those descriptions were absolutely false ; they could not with any shadow of truth be applied to the Persons supposed to be intended ; this distinction between incomplete and false Descriptions is implied in the Answer of the Judges in *Gordon's Case*, " In awarding Execution we must pursue the Act of Parliament on which the Judgment is founded ;" in other Words, we cannot go contrary to the Act, we cannot award Execution against *Alexander*, on a Judgment against *Thomas* ; for the Law will not intend that *Alexander* and *Thomas* are the same Person, and we must judicially take notice of legal Intendments.

So in the Case of *Thomas Ormond*, by Intendment of Law *Thomas Ormond Knight*, and *Thomas Ormond Yeoman*, are two different Persons ; for Knight being a Title

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of Dignity is parcel of the Name; they are in legal Estimation as different Persons as Men bearing two different Christian Names.

IT hath been said that Lord *Pitsligo*, was he to be taken, might plead his Misnomer in bar of Execution. That is absolutely denied. He could not plead a Misnomer: he could plead no other Plea than what all People in the like Circumstances must plead, which is, **that he is not the Person named in the Act*. That is the only Issue upon which he could put his Case: on that Issue which is a meer matter of Fact, he must stand or fall. And upon that Issue we submit the present Case.

IT hath likewise been said that were he to be pardoned by the Name of Lord *Pitsligo*, and afterwards indicted by the Name of Lord *Forbes of Pitsligo*, such a Pardon would not avail him. That likewise is denied. He would be intitled to the full Benefit of the Pardon pleading it with a proper Averment, that *Alexander* Lord *Forbes of Pitsligo* named in the Indictment, and *Alexander* Lord *Pitsligo* named in the Pardon, is one and the same Person; for there would be nothing in this Averment contrary to the Intendment of Law as, possibly in the Case of different Christian Names there might.

THE Council having concluded, their Lordships put the following Question to the Judges, and adjourned to the next Day.

THE great Grandfather of the Respondent being by Letters Patent under the great Seal of *Scotland* in the Year 1633 created a Peer of *Scotland* by the Title of Lord *Forbes of Pitsligo*, and the Respondent and his Ancestors claiming under the said Letters Patent having commonly used and subscribed themselves to Deeds and other Instruments, sometimes by the Name or Stile of *Forbes of Pitsligo*, and sometimes *Pitsligo*, and having been commonly described and known in legal Proceedings and otherwise, as well by the Name or Stile of Lord *Pitsligo* as of Lord *Forbes of Pitsligo*, and the said Respondent and his Ancestors having been always entered in the Rolls of the Parliament of *Scotland* (except in one

* See the Record in the Case of *Barkstead, Okey and Corbet*, cited in Dr. *Camoren's* Case.

private Act of Ratification passed in 1681.) by the Name or Stile of Lord *Pitfligo*; and it not being proved or alleged in this Cause that any other Person besides the Respondent was at or before the passing of the Act of Parliament herein after mentioned called or known by the Name or Title of Lord *Pitfligo*; and the Respondent not having surrendered himself to Justice on or before the Day specified in the Act of the nineteenth Year of the Reign of Geo. 2^d. for attainting *Alexander* Earl of *Kellie* and others therein named of high Treason; whether the Respondent is by Virtue of the said Act attainted of high Treason by the Name or Title of *Alexander* Lord *Pitfligo*?

THE Judges upon Conference among themselves agreed, that supposing the Respondent is the Person intended and named in the Act, he is sufficiently described by the Title of Lord *Pitfligo*: since that Description, though incompleat in point of strict Form, is not repugnant to Truth; which differeth this from the Cases of *Gordon*, *Farquarson* and *Ormond*; and bringeth it within the Rule upon which alone many of the Acts of Attainder cited by the Council for the Crown, especially those since the Restoration, can be supported.*

BUT lest by giving a categorical Answer to the Question as stated, they might be thought to give an Opinion on a Matter of Fact as well as on the Point of Law (which they will always avoid) it was agreed that my Lord Chief Justice in delivering the Opinion of the Judges should acquaint their Lordships, that the Judges do not presume to give any Opinion whether the Respondent is the Person named in the Act; that being a matter of Fact of which their Lordships are now the proper Judges; and in a Proceeding in *Westminster-Hall* would be the Province of a Jury; but if their Lordships are satisfied that the Respondent is the Person named in the Act, the Judges are of Opinion that he is sufficiently described and well attainted by it.

ACCORDINGLY the next Day my Lord Chief Justice delivered the Opinion of the Judges to the Effect above mentioned.

* In the Proceeding against the Earl of *March*, upon which he was attainted in the 4th of *Edw.* 3, he is stiled throughout the Record, *Roger de Mortimer*.

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LORD Chancellor spoke largely declaring his Concurrence with the Opinion of the Judges in point of Law ; and the House unanimously reversed the Interlocutor and dismissed the Claim.*

The Case of JOHN DRUMMOND Esqr. commonly called Lord John Drummond in the House of Lords.

JAMES Lord *Drummond*, commonly called Duke of *Perth*, being seized in fee of the Lands and Earldom of *Perth*, by deed of Settlement dated the 16th Day of *June* 1743. granted sold and disposed his said Estate to *Thomas Drummond* of *Logiealmond*, Esqr. and his Heirs, but redeemable in manner herein after mentioned, upon Trust for the Payment of all his the said *James's* Debts, and subject to his Debts and to some prior Charges then subsisting, upon Trust to pay to the said *James* during his Life an Annuity of two hundred Pounds sterling ; and after his Decease upon the like Trust for his Brother the said *John Drummond* during his Life ; and upon further Trust to convey the Premises, subject to his Debts and the said Annuities, to *John Drummond* Uncle to the Grantor in Tail General, Remainder to his Sister *Mary Drummond* in Tail General, Remainder to the Trustee himself in Tail General, remainder to the right Heirs of the Grantor.

AND upon further Trust to pay to such Wife as the Grantor should marry, during her Life, an Annuity of 10,000 Marks *Scots*, for the separate use of such Wife ; and not to be subject to the Grantor's *Jus Mariti*.

THEN followeth the Power of Redemption to which the whole Disposition is made subject, viz. that after Payment of the Debts of the Grantor, the Premises should be redeemable from the said Trustee, and from the said *John Drummond* the Uncle, and the said *Mary Drummond*, and

* The whole Answer of the Judges as it standeth on the Lords Journal is ; " That the Respondent is fully and effectually attainted by the Act of the 19th of Geo. 2^d. by the " Name or Title of *Alexander Lord Pitligo*." But the Lord Chief Justice did deliver the Opinion with the Caution and Reserve touching the Fact of the Identity of the Person, as above reported. Though the Journal is silent as to that Matter, the Opinion delivered in Writing not being sufficiently explicit in that Respect.

the Heirs of their bodies respectively, by the Heirs of the Body male or female of the said Grantor, and failing such Heirs, by the Heirs of the Body male or female of the said *John Drummond* his Brother, on Payment of 200*l.* sterling to the Trustee his Heirs and Assigns at the Market-cross of *Edinburgh*: or in their Absence to the Provost, or any of the Bailiffs, Dean of *Gild*, or Treasurer of *Edinburgh*.

At the Time this Deed was executed *James* Lord *Drummond* the Grantor had entered into the treasonable Engagements with the Pretender, of which some Account is given by Mr. *Murray* in the Trial of Lord *Lovat*: And his Brother the said *John Drummond* was a Captain in the *French* Service: And both the Brothers afterwards engaged in the Rebellion of 1745.

JAMES Lord *Drummond* the Grantor, notwithstanding the Disposition of the Estate, continued in Possession and received the Rents and Profits to the Day of his Death; and *Thomas Drummond* the Trustee knew Nothing of the Deed at the Time it was executed, never had the Possession of it, or so much as saw it.

By the Act of the nineteenth of George 2^d, reciting 19. Geo. 2. that the said *James Drummond* and *John Drummond* his c. 21. Brother and other Persons therein named did on or before the 18th of April 1746, levy War against the King and were fled from Justice, It is enacted, that if the said *James Drummond* and *John Drummond*, &c. shall not render themselves to Justice on or before the 12th of July 1746, they shall from and after the 18th of April 1746, stand and be adjudged attainted of high-treason to all Intents and Purposes whatsoever; and shall suffer and forfeit as Persons attainted of high Treason by the Laws of the Land ought to suffer and forfeit.

JAMES Lord *Drummond* died on the 11th of May 1746, in his Passage to *France* after the Action at *Culloden*; and the said *John* his Brother and presumptive Heir, did not surrender pursuant to the Act, and so became attainted; and the Court of Exchequer in *Scotland* pursuant to the Act of the 20th of George 2^d, caused the Estate com- 20. Geo. 2. prized in the Settlement to be seized and surveyed for c. 41. his Majesty's Benefit, as being forfeited by that Attainder.

THOMAS

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THOMAS *Drummond*, the Trustee named in the Settlement of the 16th of *June* 1743, put in his Claim to this Estate in due Time in the Court of session in *Scotland*, pursuant to the last mentioned Statute, and founded his Claim on that Settlement; alledging that the said *John Drummond* was never seized of, or interested in the said Estate, but that the Claimant had right thereto by Virtue of the said Settlement.

To this claim his Majesty's advocate, on behalf of his Majesty, put in an answer, insisting on his Majesty's right grounded on the attainder and the forfeiture of *John Drummond*; and the cause coming to hearing before the court of session, that court found that the said *John Drummond* was upon the eleventh of *May* 1746 when the said *James* his elder brother died, capable to take by Descent from his said elder Brother; and that the Estate in Question did then descend to the said *John* his brother, and was forfeitable and forfeited by his Treason and Attainder; and that the said Trust-disposition to the Claimant, is not sufficient to exclude the Forfeiture of the said *John Drummond*, and thereupon dismissed the Claim.

FROM this Decree the trustee *Thomas Drummond* appealed; and the Cause came to hearing in *April* 1751.

Two Questions were made in this Case; First, Whether by the Laws of *Scotland* the settlement of the sixteenth of *June* 1743 was void, as having never been delivered to the Grantee or any Person on his Behalf, but remaining always in the Possession or Power of the Grantor?

Mr. Hume
and
Mr. Yorke.

THIS Point was not greatly laboured by the Council for the appellant; and as what was said upon it on either side was grounded on the Laws of *Scotland*, by which the Validity of all *Scotch* Settlements must be determined, and which I do not understand, I will not take upon me to report the Arguments on that Point.

THE second Question was, supposing the Settlement to be void, and that *James Lord Drummond* died seized in Fee, whether his Brother the said *John Drummond* did take by Descent any Estate in the Premises which was forfeitable by his Attainder?

THE Council for the Appellant argued, that he did not; that he was incapable of it; he had no heritable Blood in him on the eleventh of *May* 1746, the Day his Brother died: for, not having surrendered pursuant to the Act which attainteth him, he is now to be considered as a Person attainted from the *eighteenth of April* preceding.

IF he had been actually attainted before the Death of his Brother he could not have taken by Descent; the Land must have escheated. Lord Chief Justice *Coke* is full to this point. “The Father is seized of Land in Fee holden of J. S, the Son is attainted of Treason, the Father dieth, the Land shall escheat to J. S. *propter defectum Sanguinis*, for that the Father died without Heir: and the King cannot have the Land because the Son had never any thing to forfeit.” 1. Inst. 13. a.

Lord Chief Justice *Hale* putteth a stronger Case on the same Principle, “If there be a Father and two Sons, the eldest is attainted and surviveth his Father but a Day, and then dieth without Issue, the second Son cannot inherit, but the Land shall escheat *pro defectu Hæredis* ;” and if in the present Case the Land escheated, the whole Proceeding in the Court of Exchequer in *Scotland*, of which the Appellant complaineth, is void; it is *Coram non Judice*. For that Court hath no Jurisdiction touching Escheats, which by the Law of *Scotland* are cognizable only in the Court of Session. 1. Hale. 356.

It must be admitted that the Attainder of *John Drummond* was not compleat ’till after the 12th of *July*; but being then compleated, we say the Statute expressly carrieth it back to the eighteenth of *April* preceding to all Intents and Purposes whatsoever.

AND if he had been possessed of any other Estate, and between the eighteenth of *April* and the twelfth of *July* had made a Settlement of it upon the most favoured Considerations, for Payment of his Debts, or in Consideration of Marriage; or had sold it for a valuable Consideration actually paid, his Attainder would have overreached this Settlement or Sale. He would have been considered by Virtue of this retrospective Clause as a Man disabled and under an Attainder at the Time the Sale or Settlement was

was made. And shall he now be considered as a Person under an Attainder to one Purpose alone, and not to all other Purposes?

We are not now in the Case of an Attainder in the ordinary Course of Justice; in those Cases 'tis true, no corruption of Blood is wrought 'till an actual Attainder, though upon an Attainder the forfeiture hath Relation to the Time of the Treason committed; which Relation is a meer Fiction of Law, introduced for the Purpose of overreaching mesne Incumbrances. But we are in the Case of a Parliamentary Adjudication; the Legislature hath pronounced Judgment of Attainder upon *John Drummond* and others; and in pronouncing that Judgment hath determined the Time from which it shall operate to every Intent.

Mr. Attorney and the Lord Advocate.

THE Council for the Crown insisted, that on the eleventh of *May* 1746, when *James* Lord *Drummond* died, *John Drummond* was capable of taking the Lands in question by Descent, and remained so 'till after the 12th of *July*: that during all that Interval, the Estate vested in him, for it must vest somewhere on the Death of *James*; and in the Crown it could not vest by Escheat, while there was an Heir in being capable of inheriting: and consequently *John* being seized at the Time of his Attainder, the Lands became forfeited, and are now vested in the Crown by the express Provision of the Act of the 20th of *Geo.* 2.

THIS cannot be denied upon a Supposition that *John Drummond* took by Descent from his Brother; and therefore it is said that he was not capable of inheriting; that he must be considered, by virtue of the retrospective Clause, as under an Attainder from the 18th of *April* preceding his Brother's Death.

THIS will receive a very short Answer. Acts of Parliament, like Wills, are to be construed according to the plain obvious Intent of the Makers; the Intent of the retrospective Clause was to determine the Time to which the Forfeiture should relate, in order to protect the Title of the Crown against all Incumbrances subsequent to that Time; this was clearly the Point, and the only Point the Legislature had in view; to imagine that the Legislature intended to defeat the Title of the Crown upon the Contingency which hath happened in the present

sent Case, (and it might have happened in the Case of every Man attainted by the Act) would be to suppose, that it intended to defeat and to protect the Title of the Crown upon different Contingencies, by one and the same Provision in the Act; this is too absurd to be imagined: and therefore the Construction contended for, grounded on the general Words, *to all Intents and Purposes whatsoever*, cannot be supported by any rule of Construction.

FOR it is a known Rule in Law, that general Words in an Act of Parliament are not to be carried beyond the plain Intent of the Act; especially where the Rights of the Crown would suffer by such a Latitude of Construction.

THE Council having concluded, the House put the following Question to the Judges and adjourned to the next Day, Whether by the Law of England, *John Drummond* second Son of the late Lord *Drummond* was on the 11th Day of *May* 1746, capable of taking Lands by descent; and whether by his not rendering himself to Justice on or before the 12th Day of *July* 1746, according to the Act of the 19th Year of Geo. 2d. such descent became divested or avoided so as to prevent the Forfeiture in prejudice of the Crown.

THE Judges upon Conference among themselves agreed, that the Interest descended to *John Drummond*, and was forfeited by his Attainder. They considered the Act in the light of a parliamentary Outlawry. The Act chargeth that the Persons therein named did *on or before the 18th of April* 1746, levy War against the King, and were fled from Justice; and then proceedeth to attain them if they do not render themselves to Justice on or before the twelfth of *July*.

THIS being an Attainder out of the ordinary Course of Justice, it was proper on all Accounts to fix the Time to which it should relate, for avoiding all mesne Incumbrances; the Legislature hath done it, and in so doing, hath acted in exact conformity to the common Law in the Case of an Outlawry for high Treason in the ordinary Course of Justice: in which Case the Attainder relateth to the Time of the Treason *laid in the Indictment*. Accordingly in the present Case the Attainder is, by the retrospective Clause in Question, carried back to the very Day on which the

v. Bro. Relat-
tion. 43.

1. Hale 361.

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the Treason is by the Preamble charged to have been committed.

THIS fully accounteth for the retrospective Clause, and fixeth the Sense of it. It was plainly inserted in exact Conformity to the common Law, and must therefore be accommodated to the Rules of Law in similar Cases. For it is a safe Rule of Construction, that Statutes made in imitation of the common Law, shall be expounded according to the Rules of Law in like Cases.

LET it be supposed that *John Drummond* had been outlawed upon an Indictment for this Treason, and that the Indictment had charged the Fact to have been committed, as this Act doth, on the 18th of *April* 1746; his Attainder for the Purpose of avoiding all mesne Incumbrances would have related to that Day; and yet if, pending the Process of Outlawry, his Brother had died seized of the Estate in question, it would undoubtedly have been forfeited by *John's* Attainder; for he would have been considered during the Pendency of the Process of Outlawry, as a Person capable of taking by Descent. And consequently in the present Case he must in conformity to the Rule of Law in the Case of an Outlawry, be considered as a Person capable of inheriting and holding on the eleventh of *May*, and thence forward to the 13th of *July*; an Interval exactly analogous to the Pendency of Process of Outlawry at common Law.

THE next Day the Lord Chief Baron, in the Absence of the two Chief Justices, delivered the opinion of the Judges: that the said *John Drummond* was on the eleventh of *May* 1746, capable of taking Lands by Descent; and that by his not rendering himself to Justice on or before the 12th of *July* 1746, according to the above-mentioned Act of the 19th Year of Geo. 2^d. such Descent did not become divested or avoided so as to prevent the Forfeiture in Prejudice to the Crown. And the Lords unanimously affirmed the Decree.

The Case of Captain JOHN GORDON, in the House of Lords.

SIR *James Gordon*, by Settlement dated 19th October 1713, entailed his Barony and Lands of *Park* in Scotland on himself for Life, Remainder to *William Gordon* his eldest Son and the Heirs Male of his Body; remainder to the Heirs Male of Sir *James's* own Body, with several other subsequent Limitations.

By this Settlement *William Gordon* the Son, and other Heirs of *Tailie*, are according to the Forms used in Scotland in the Case of strict Settlements, prohibited to alter the Course of Succession by Alienation or by any Charge on the Estate: or by any Acts civil or criminal, even treasonable Acts, whereby the same may become escheat or forfeited. And all Acts to be done by any Person in Possession under the Entail contrary to this Prohibition, are declared to be null and void as against the Person next in Succession; who, in case of such Contravention, shall succeed to the Estate in the same manner, as if such Contravener were naturally dead.

SIR *James Gordon* died, and his Son *William Gordon*, then Sir *William*, became duly seized under this Settlement.

HE took a part in the Rebellion of 1745, and was attainted by the Act of the nineteenth of Geo. 2. and his Barony and Lands of *Park*, were surveyed and seized to the use of his Majesty under the Act of the 20th of Geo. 2.

CAPTAIN *John Gordon*, who is Sir *William's* next Brother, put in his Claim in the Court of Session in due Time, and in that Claim stated the Substance of the Settlement of October 1713, with the prohibitory and irritant Clauses before mentioned, and insisted, first, that Sir *William* had long before his Attainder incurred an *Irritancy*, as they call it, of this Estate, by creating an Incumbrance on it in Favour of one of his Creditors; and that thereupon the Estate devolved immediately upon him (the Claimant) as next Heir in Tail, under the Limitation

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mitation to the Heirs of the Body of Sir *James*, Sir *William* having then no Issue.

SECONDLY, that in Case * there was no such Irritancy incurred, yet Sir *William* by committing the Crime of Treason did contravene the prohibitive Clause, and lost his Title to the Estate, which thereby immediately fell to the Claimant.

AND thirdly, that Sir *William* could at the worst forfeit by his Attainder only an Estate for his own Life, and upon his Death the Premises in Question must devolve upon the Claimant, and the other Heirs in Tail.

To this Claim his Majesty's Advocate put in an Answer : and as to the Irritancy supposed to be incurred by the Incumbrance, insisted, that as Sir *William Gordon* might by the Law of *Scotland* have been relieved against that Irritancy, if the Claimant had endeavoured in due time to take advantage of it, it shall not now be set up to overreach the Title of the Crown by the Attainder.

7. An. c. 21. AND as to the second and third Points insisted on by the Claimant, he relied on the Statute of *Queen Anne*, whereby Persons attainted of high Treason in *Scotland*, are made liable to the same forfeitures as Persons attainted of high Treason in *England* ; and on the Statute of *H. 8.*, whereby all Estates of Inheritance are made subject to Forfeiture for high Treason ; and insisted that Sir *William Gordon* was by Virtue of the Settlement of *October 1713*, seized of an Estate of Inheritance in the Premises at the Time of his Attainder.

26. H. 8. c.
13.

THE Case coming on to be heard before the Court of Session their Lordships pronounced their Decree to the effect following.

THEY find that Sir *William Gordon* is by the Entail disabled from alienating or incumbering the Estate in Question, or altering the Course of Succession in Prejudice of the Claimant and other Heirs in Tail ; or from impairing their title to the same after his Death. And that therefore the said Estate is by Sir *William's* Attainder, forfeited to the

* See *Bendloe pl. 289*. Gift in Tail upon a Condition something similar to this. The Donee committed Treason and was attainted, adjudged that the Title of the Crown under the Attainder was not affected by this Condition.

It was a Condition repugnant to the nature of Feudal Tenure, and against the Wisdom and Policy of the Law.

Crown

Crown only during his Life; and that the Claimant hath Right to the same after the Death of Sir *William*.

THEY also find, that the Irritancy alledged to have been incurred by Sir *William* by the Incumbrance in favour of his Creditors, not having been in due Time taken Advantage of, the Forfeiture by his Attainder cannot now be over-reached on Pretence of that Irritancy. And decree accordingly.

From this Decree both Sides appealed. His Majesty's Advocate from that Part of it which declareth that Sir *William Gordon* forfeited during his Life only; and that the Claimant and other Heirs in Tail will be intitled after his Death.

MR. *Gordon* from that Part, which declareth that the Forfeiture by the Attainder cannot be over-reached on pretence of the Irritancy. And the Cause came to hearing in April 1751.

I say nothing of what was offered on either Side upon Mr. *Gordon's* Appeal, because the Merits of it depend entirely on the Laws of *Scotland*.

Two Points were made upon the Lord Advocate's Appeal.

FIRST, whether Sir *William Gordon* was by the Laws of *Scotland*, seized of any Estate of Inheritance in the Premises in Question at the Time of his Attainder?

SECONDLY, what Estate or Interest was forfeited by his Attainder?

It was insisted on in Behalf of the Crown, and not much controverted on the part of Mr. *Gordon*, that Sir *William* was seized of an Estate in Tail Male in possession; and that such Estate, though not alienable or chargeable by him longer than for his own Life, is by the Law of *Scotland* deemed an Estate of Inheritance.

AND on the other Hand, it was admitted on the Part of the Crown that the Limitation to the Heirs Male of the Body of Sir *James Gordon* on Failure of Issue Male of Sir *William* (who was his eldest Son) is not by the Law of *Scotland* an Estate Tail executed in Sir *William*; but is a Substitution, as they call it, in Nature of a Remainder created in Favour of the younger Sons of Sir *James*, and not affected by the Attainder of Sir *William*.

Mr. Hume
Campbell,
and Mr.
Lockhart.

See the Acts
of 1685 and
1690.

THE Point principally laboured by Mr. Gordon's Council was, that admitting Sir William to have been seized of an Estate of Inheritance, yet since by the Laws of Scotland, he could not alien or incumber it for more than his own Life, (which the Council for the Crown admitted) the Consequence is, that he cannot forfeit any greater Estate in the Premises than during his Life; and this they said, is perfectly agreeable to the Rules of our Law in similar Cases.

BEFORE the Statute *de Donis*, the Tenant who was then considered as seized of a conditional Fee, could *post Prolem suscitata*, alien or incumber the Fee at his Pleasure: and in consequence of that, he could likewise forfeit the Fee for Treason or Felony.

1. Inst. 13. BY having Issue, the Condition annexed to the Fee was considered as performed to three Purposes, to alien, to forfeit, and to incumber. But when the Statute *de Donis* took away the Tenant's Power of Alienation, it was constantly held that he could not forfeit for Treason or Felony; though there is not a Word in the Statute which directly cometh up to the Case of Forfeitures. The Words are "*Non habeant Potestatem Alienandi*:" but the Judges, by an equitable Construction of the Statute, held that the Power of forfeiting was included in the Word *Alienandi*; for, saith my Lord Coke, *Forisfacere*, is *Alienum facere*.

2. Inst. 334.

3. Inst. 19.

BY the Statute of Treasons the Forfeiture of Traitors Estates is given to the Crown in very general Words: but the Rule was, that the "Act doth not extend to " Lands in Tail; for Tenant in Tail shall forfeit no " more than he may lawfully forfeit, that is, for his " own Life: and the general Words of the Act do not " abrogate the Statute *de Donis*." The like Rule is laid down upon the Construction of the Statute of Provisors, where the Words creating the Forfeiture are very general; the Rule is " Tenant in Tail shall forfeit no " more than he may lawfully forfeit, that is for his own " Life."

3. Inst. 126.

THE same Rule prevailed with regard to Estates Tail of the gift or provision of the Crown. When the 34th of H. 8. had rendered them unalienable by the Tenant in Tail, the Judges upon the Construction of that Statute, constantly

constantly held that they were forfeitable only during the Life of the Tenant by his Attainder for Treason or Felony. 1. Hale. 243.

FROM these Instances, they argued, it appeareth that the Power of Alienation and a Capacity to forfeit, constantly went hand in hand. It was thought unreasonable and against natural Justice, to carry one beyond the other. And therefore in the present Case, admitting that Sir *William Gordon* was at the time of his Attainder seized of an Estate Tail in the Premises, yet since by the Law of *Scotland* he had no Power over the Estate more than for his own Life, he could not forfeit more than his Life Interest in it.

THE Council for the Crown relied on the Act of the 7th of *Queen Anne*, which hath incorporated the Law of *England* with regard to high Treason and the Forfeitures for it, into the Law of *Scotland*, as effectually as if every *English* Statute and Rule of Law touching those matters had been transcribed and enacted in it. And therefore, whatever Statutes did subsist in *Scotland* before this Act, by which Estates Tail were protected against Forfeitures for high Treason, they are now totally repealed. Mr. Attorney General, and the Lord Advocate.

'TIS true that from the making the Statute *de Donis* to the 26. *H. 8*, Estates Tail were not forfeitable for high Treason, they are not forfeitable for Felony to this Day; but the Law in this Case was not founded on the Principle laid down on the other Side, that a Capacity to forfeit and a Power of Alienation always went hand in hand, or were in the Nature of convertible Terms; it rested on a much stronger Foundation, *viz.* upon the Words of the Act itself; "the Land shall remain to the Issue of them to whom it was given, after their Death; or revert to the Donor or his Heirs if Issue fail."

So with regard to Estates Tail of the Gift or Provision of the Crown, they after the 34th of *H. 8*, were held to be unforfeitable to the Prejudice of the Heir in Tail; not upon the Principle relied on, but from the express Words of the Act. "After the Death of such Tenant in Tail the Heir in Tail may enter, have, and enjoy the Lands according to the Form of the first Entail; the said recovery, or any other Thing or Things

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“ *Things hereafter to be had, DONE, or suffered, by or*
 “ *against such Tenant in Tail, to the contrary notwithstanding.*”

’Twas upon the Foot of these exprefs Provisions, *that the Heir in Tail shall after the Death of the Tenant hold and enjoy*, that these Estates were protected from Forfeitures. But the 26. of *H. 8.* repealed the Statute *de Donis* as far as concerneth Forfeitures for high Treason, as the 5th and 6th of *Ed. 6.* did that of the 34th *H. 8.*

AND how was this Repeal effected? not by any exprefs Declaration to that Purpose, but by enacting “ that every Offender being lawfully convict of any
 “ Manner of high Treason shall lose and forfeit to the
 “ King his Heirs and Successors all such Lands which
 “ any such Offender shall have *of any Estate of Inheri-*
 “ *tance* within the King’s Dominions at the time of such
 “ Treason committed, or any Time after. Saving to all
 “ Persons, other than Offenders and their Heirs, all
 “ such Right as they might have had if this Act had not
 “ been made.” These are the Words of the 26th of *H. 8.*; and the 5th and 6th of *E. 6.* runneth in the same Form, as far as concerneth the present Question.

By these Statutes all Estates Tail were made liable to Forfeiture for high Treason, *as being Estates of Inheritance.* It was their descendible Quality which brought them within the Acts; that quality alone was regarded, not whether they were alienable by the Tenant in Possession.

FOR ’tis well known that long before the 26th of *H. 8.*, Tenant in Tail in Possession had an absolute Power over the Estate. He could bar his Issue by Fine, and all Remainders were barrable by a common Recovery; and yet ’till that Act operated upon his Estate, it was under the Protection of the Statute *de Donis.* On the other Hand, Estates Tail of the Gift or Provision of the Crown are unalienable to this Day, and yet are subject to Forfeiture for high Treason.

AND Persons seized of the Inheritance *En auter droit*, Persons under a Trust not to alien, and who had singly no power of Alienation, were by the 26th of *H. 8.* rendered capable of Forfeiting the whole Inheritance for high Treason. This was the Case of Abbots, Bishops, Deans, Prebendaries, and other sole Corporations who were seized of the
 Inheritance

Inheritance *Jure Ecclesiæ*; 'till the 5th and 6th of *Ed.* the 6th, by confining the Forfeiture to Persons seized of the Inheritance in *their own right*, restored and preserved the Right of Successors, as it was at common Law.

THE Point therefore is not whether Sir *William Gordon* had a Power of Alienation over the Estate in Question, but had he or had he not any Estate of Inheritance in it at the Time of his Attainder? if he had, the Inheritance, whatever it be, is forfeited. For as the 26th of *H. 8.* took Estates Tail out of the protection of the Statute *de Donis*; and the 5th and 6th of *Ed.* the 6th took Estates Tail of the Gift or Provision of the Crown out of the Protection of the 34th and 35th of *H.* the 8th; so the 7th of Queen *Anne* hath taken this Estate out of the Protection of any Acts made in *Scotland*, whereby Forfeitures for high Treason were saved. 1. Hale. 252.
253.
Acts of 1685.
and 1690.

AND that the Legislature in framing that Act had a View to Estates Tail affected with irritant and prohibitive Clauses, which is the present Case, and considered them as Inheritances thereby made forfeitable for high Treason, is plain from the Proviso in the fourth Section; which provideth that in certain Cases therein mentioned, such Estates shall not be forfeited upon the Attainder of the Tenant in Tail, but during the Life of such Tenant only. "So that the Issue and *Heirs* in Tail shall inherit the same, the said Attainder notwithstanding.

NOTHING can be clearer than that the Estates saved from Forfeiture by this Proviso are considered by the Law of *Scotland* as Estates of Inheritance. And the Caution taken to save Estates of this Kind under *the special Circumstances mentioned in the Proviso*, plainly sheweth that without this Caution, they would have been involved in the general Purview of the Act.

THE Council having concluded, the Lords put the following Question to the Judges and adjourned to the next Day.

SUPPOSING that by the Law of *Scotland*, an Estate Tailzie, with prohibitive, irritant, and resolute Clauses, is an Estate of inheritance; and supposing also that by the Law of *Scotland* no Estate or Interest was vested in Sir *William Gordon* by Virtue of the Limitation in the Settlement of the 18th of *October* 1713, to the Heirs Male of the Body of Sir *James Gordon*, what Estate or Interest in the

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Barony and Lands in Question, was forfeited to the Crown, under the Limitations of the said Settlement, by the Attainder of Sir *William Gordon*?

ON the next Day the Lord Chief Baron, in the Absence of the two Chief Justices, delivered the Opinion of the Judges, as followeth.

UPON this Question we are of Opinion that the Estate and Interest in the Barony and Lands in Question which was forfeited to the Crown under the Limitations of the said Settlement by the Attainder of Sir *William Gordon*, was not only during the Life of Sir *William Gordon*, but so long as there shall be any Heir Male of his Body; and also the reversionary Interest in the Fee thereof, limited by the said Settlement to the Heirs and Assigns whatsoever of the said Sir *James Gordon*, on Failure of the Heirs Male of the Body of the said Sir *James Gordon*, and the Determination of the several Estates by the said other Substitutions; supposing that by the Law of *Scotland* such reversionary Interest was in Sir *William Gordon* at the Time of his Attainder.*

WHEREUPON their Lordships ordered and adjudged that the first Part of the said Interlocutor whereby the Lords of Session found “ that Sir *William Gordon* the Person attainted, being by the Entail disabled from alienating “ the Estate, charging the same with Debts, or altering

* In this Case there being an express Limitation to Sir *William Gordon* the eldest Son and the Heirs Male of his Body, previous to the Remainder limited to the Heirs Male of Sir *James* the Father, the Lords considered this Remainder to the Heirs Male of the Body of the Father in the same Light as it is considered by the Law of *Scotland*; namely, as a Substitution in Favour only of the younger Sons of Sir *James*; and under which Sir *William* the eldest took no Estate upon the Death of his Father; and consequently that by the Attainder of Sir *William* the Estate limited to the Heirs Male of Sir *James* was not forfeited.

But had the Limitation been to Sir *James* and the Heirs Male of his Body, without any previous Limitation in favour of Sir *William*, and Sir *William* had on the Death of his Father become intitled under that Limitation as Heir of his Body, in that Case the whole Entail would have been forfeited by his Attainder, that is, as long as there should be Heirs of the Body of Sir *James*.

It was so adjudged in the House of Lords in May 1753, in a Cause wherein *Charles Mercer* second Son of Sir *Lawrence Mercer* was Appellant, and his Majesty's Advocate for *Scotland*, in Behalf of his Majesty, Respondent.

“ the

“ the Course of Succession in Prejudice of the Claimant and
 “ other Heirs of Tailzie, or from otherwise hurting or
 “ impairing their Right or Title to the said Estate after
 “ his Death in any Manner of Way whatsoever, that
 “ therefore the Estate and Barony of *Park* is by Sir *William*
 “ *William*'s Attainder forfeited to the Crown only during
 “ his Life; and find that the said *John Gordon* the
 “ Claimant hath Right to the said Estate and Barony
 “ of *Park* after the Death of the said Sir *William Gordon*,
 “ be and the same is hereby reversed.”

AND it is further ordered and adjudged, that the latter Part of the said Interlocutor whereby the Lords of Session found “ that the Irritancy alledged to be incurred by Sir *William Gordon* the attainted Person not
 “ having been declared nor any Advantage taken of it
 “ before the Forfeiture, the Forfeiture cannot be over-
 “ reached or excluded on pretence of that Irritancy,”
 be and the same is hereby affirmed.

AND it is also hereby declared and adjudged, that Sir *William Gordon* the Person attainted, being, under the Settlement made by his Father Sir *James Gordon*, dated the 19th of *October* 1713, seized of an Estate Tailzie in the Barony and Estate of *Park*, notwithstanding such Tailzie was affected with prohibitive, irritant and resolute Clauses, the said Barony and Estate of *Park* did, by Virtue of the Statute of the 7th year of the Reign of Queen *Anne* Chap. 21. become forfeited to the Crown by the said Sir *William Gordon*'s Attainder, during his Life, and the Continuance of such Issue Male of his Body as would have been inheritable to the said Estate Tailzie in case he had not been attainted; and also for such Estate and Interest as was vested in, or might have been claimed by the said Sir *William Gordon* by Virtue of the last Limitation in the said Settlement to the Heirs and Assigns whatsoever of the said Sir *James Gordon*, after all the Substitutions therein contained shall be expired or determined,

AND that by virtue of the Substitution to the Heirs Male of the said Sir *James Gordon*'s Body of his then present Marriage, the Respondent *John Gordon* hath right to succeed to the said Barony and Estate of *Park* after the Death of the said Sir *William Gordon* and Failure of such Issue Male of his Body as aforesaid, according to the Limitations of the said Settlement. And it is further ordered that Liberty be reserved to the Crown, and also to the

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said *John Gordon*, and any other Person who may become entitled to the said Barony and Estate of *Park* by Virtue of any of the said Substitutions, to apply to the said Court of Session for such further Order or Direction in the Premises as shall be just, as often as any new Right shall accrue to them respectively in Consequence of any of the Substitutions or Limitations in the said Settlement.

Note. THE Court of Session, in all Cases of the like Kind which came before them after the Rebellion of 1715, held according to an Opinion then generally entertained among the *Scotch* Lawyers, that Estates Tail affected with irritant, prohibitive, and resolute Clauses, were liable to Forfeiture only during the Life of the Person forfeiting : and the Crown did not appeal from any of those Judgments. Though it is extremely clear that, supposing those Estates to be by the Law of *Scotland* Estates of Inheritance, they are made liable to Forfeiture for high Treason by the Statute of *Queen Anne*, in the same Manner as Estates of Inheritance in *England* are made liable to Forfeiture by the Statutes of *H. the 8th* and *Edw. the 6th* cited in the Argument of this Case. And that they are by the Law of *Scotland* Estates of Inheritance, was not denied by *Mr. Gordon's* Council. See *Craig de Jure feudal. L. 2. c. 16. De Successione Taliata, S. 2. 3.*

*The Case of JOHN SWAN and ELIZABETH
JEFFERYS.*

AT *Chelmsford* Assizes in the Summer 1751, *John Swan* and *Elizabeth Jefferys* were indicted for the Murder of *Jefferys*, *Swan* for giving the mortal Wound, and *Jefferys* for being present aiding and abetting, and they both pleaded not Guilty : but their Trial was postponed to the next Assizes.

IN the mean time the Attorney General, who had received Orders to prosecute at the Expence of the Crown, was satisfied from the Evidence laid before him, that *Swan* was in the actual Service of the Deceased at the time the Murder

Murder was committed, or at least when the Design was first laid. He therefore thought it adviseable to prefer another Bill against them for the Parts they respectively took in the same Murder, charging *Swan* with Petty Treason, and *Jefferys* with Murder. Accordingly at the next Assizes such Bill was preferred and found, and the Prisoners were arraigned upon it.

THE Prisoners pleaded in Abatement *Ore tenus* that another Indictment was depending for the same Offence: and pleaded over to the Treason and Felony. The Council for the Crown did not insist upon drawing up the Plea in Form (as was done in *Laver's Case*) but demurred *Ore tenus*; and the Council for the Prisoners joined in Demurrer.

MR. Justice *Wright* who sat on the Crown Side desiring the Company of Mr. Justice *Foster* who went that Circuit with him, at the arguing the Plea, he went into Court and sat there 'till that Matter was determined and the Jury sworn.

THE Prisoners Council insisted that they ought not to have been arraigned on this new Bill, pending the former Indictment on which Issue is already joined. Because if they plead to Issue on this Indictment they may be liable to be tried twice for one and the same Fact. It will be in the Option of the Crown after Issue is joined upon both Indictments, to proceed to Trial upon either of them; and if the Prisoners should be acquitted upon one, they may still be tried upon the other. For though *Auterfoits* acquit of Murder may be a good Bar to an Indictment of Petty Treason for the same Fact, or *Auterfoits* acquit of Petty Treason, to an Indictment of Murder; yet the Prisoners having pleaded to Issue on both Indictments, they may be told they come too late with their Plea in Bar, Issue being already joined on the Fact.

THEY therefore pressed that the Trial on the first Indictment might go on before the Prisoners should be called upon to plead to the second; for, said they, if the Prisoners should be found guilty on that Indictment the Ends of publick Justice will be fully answered. And if they should be acquitted, and the Council for the Crown should think proper to proceed on this new Bill, the
Prisoners

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Prisoners ought to be left at liberty to avail themselves of that Acquittal as they shall be advised.

THE Court was of Opinion that the Charge in the Bill last found must be answered, notwithstanding the Pendency of the former, for *Auterfoits arraign* is no Plea in this Case. Perhaps the Bill last found is better adapted to the Nature of the Case than the former, and the King's Council must be at Liberty to prosecute in such Manner as may best answer the Ends of publick Justice. But at the same Time the Court must take Care, that the Prisoners be not exposed to the Inconvenience of undergoing two Trials for one and the same Fact.

WITH regard to the Prisoner *Jefferys*, the Offence charged in both Indictments is exactly the same as well in Consideration of Law as in Point of Fact; with regard to *Swan*, the Fact in both is the same; and so is the substantial Part of the Charge, *Wilful Murder of Malice prepense*. But falling under a different Consideration in the second Indictment, meerly from the Relation the Prisoner is supposed to stand in to the Deceased. And if that Relation should not be made out in proof, yet still he may be found guilty of Murder upon that Indictment.

AND therefore as the Ends of publick Justice would be fully answered with regard to both the Prisoners, by trying them on the Indictment for Petty Treason and Murder, the Court proposed to the King's Council that the first Indictment should be quashed by Consent, to which they agreed; which was accordingly done, and the Court proceeded to the Trial of the Prisoners on the second Indictment on the Issue of not guilty.

THE Court in this Case followed the Precedent in *Cro. Car. 147. Sir William Witbypole's Case*. Only they took in the Consent of the King's Council, which I think they needed not to have asked; the Justice of the Case was sufficient Warrant for what they did.

BEFORE the Jury was called, the Judges agreed between themselves that if the Prisoners should not think fit to challenge at all, they might be tried together: but if they should insist on their Challenges, they must be tried separately. Because they cannot join in their Challenges,
the

the Number of their peremptory Challenges being differently limited, *Swan's* to 35, and *Jefferys's* to 20.

THE Court informed them of this, and the Prisoner *Swan* declaring that for his part he waved all Benefit of challenging, the Prisoner *Jefferys* challenged two or three, and a Jury was sworn. The Prisoners were found guilty, *Swan* of Petty Treason, and *Jefferys* of Murder: and were both soon afterwards executed upon a Gibbet erected near the Place where the Fact was committed; and *Swan* was hanged in Chains.

AT a Meeting of the Judges at the Lord Chief Justice *Lee's* Chambers in *June* 1752 to consider of the Act of the last Session, for the better preventing the horrid Crime of Murder, it was agreed by much the greater Part of the Judges, that the Judgment for dissecting and anatomizing and touching the Time of Execution, ought to be pronounced in Cases of Petty Treason, though Murder is only mentioned, except in the Case of Women*. And in that Case too, the Time of Execution may be a Part of the Judgment.

THERE was some Doubt whether hanging in Chains might ever be made Part of the Judgment; but on Debate it was agreed by nine Judges, that in all Cases within the Act, the Judgment for Dissection and anatomizing only should be Part of the Sentence; and if it should be thought advisable, the Judge might afterwards direct the hanging in Chains by special Order to the Sheriff, pursuant to the Power given for that Purpose in the Proviso.

The Case of GEORGE GIBBONS.

AT the Old Bayly in *June* 1752, present Lord Chief Baron, Mr. Justice *Foster*, and Mr. Justice *Birch*, *George Gibbons* was indicted for Burglary in the Dwelling

* Though the 1. E. 6. c. 12. Enacteth that wilful Poisoning shall be deemed Murder of Malice prepensed, and that the Offender shall suffer and forfeit as in other Cases of wilful Murder; yet if the Wife or Servant poison Husband or Master, they are constantly indicted for Petty Treason and suffer the Pains peculiar to that Offence. Petty Treason is considered in no other Light than as an aggravated Murder.

House

House of *John Allen*. It appeared in Evidence that the Prisoner in the Night Time cut a Hole in the Window Shutters of the Prosecutor's Shop, which was Part of his Dwelling House; and putting his Hand through the Hole took out Watches and other Things which hung in the Shop within his Reach: but no Entry was proved otherwise than by putting his Hand through the Hole. This was held to be Burglary and the Prisoner was convicted.

3. Inst. 64.

N. B. THIS hath been always so held. The Law requireth an Entry, to compleat the Crime of Burglary; but if any Part of the Body be within the House, Hand or Foot, this at Common Law is sufficient. And I conceive that such a Kind of Entry will be sufficient to bring the Case within the Statutes of *Ed. 6.* and *Eliz.* with Regard to House-breaking attended with Larceny in the Day Time.

1. E. 6. c. 12.
Sec. 10.
39. Eliz. c.
15.

I am likewise of Opinion that with Regard to the single Point of breaking the House, whatever kind of breaking will make a Man guilty of Burglary at Common Law, will bring him within those Statutes; and that no Act of Violence short of a Common Law Burglary, will.

MS. Denton.

AT a Meeting of the Judges upon a special Verdict in *January 1690* they were divided upon the Question, whether breaking open the Door of a Cupboard let into the Wall of the House was Burglary or no. *Hale* saith that such breaking is not Burglary at Common Law; but thinketh it would be sufficient to bring the Case within the Statutes I have just cited. This Distinction he groundeth on *Simpson's Case*, and even saith that in that Case the breaking open a Chest in the House brought the Case within the 39th of *Eliz.* which, I speak it with great Deference, if a moveable Chest be meant, cannot be Law.

1. Hale. 527.

1. H. 508.
524.

2. Hale. 358.
Kel. 31.

SIMPSON'S Case as truly stated by *Hale* in one Part of his Work and by *Kelyng*, doth not in my Opinion warrant any such Distinction. It did not, nor possibly could, turn on the Circumstance of breaking a Chest or fixed Cupboard or any Thing like it: nor doth it appear from the State of the Case, that there was the least Occasion to resort to any such constructive breaking. For in Fact both outer and inner Doors were broke open.

THE

THE Case, in my Opinion, turned singly on this Point. The Man had broke open the Chest and brought the Goods into the Hall in order to carry them off, but was apprehended in the House. It was made a Question whether this amounted to a Stealing *in* the House within the 39th of *Eliz.* and it was held that it did: the Man had once possessed himself of the Goods *Animo furandi*. This at Common Law amounted to a Caption and Asportation, otherwise few Persons who are taken in the Fact could be convicted of Larceny; and this being so, the Construction of the Statute must be accommodated to the Rules of Common Law in like Cases. Hale's Sum.
64. 69.
Lib. Ass. 39.

WITH regard to Cupboards, Presses, Lockers and other Fixtures of the like Kind, I think we must, in Favour of Life, distinguish between Cases relative to meer Property, and such wherein Life is concerned. In Questions between the Heir or Devisee and the Executor, those Fixtures may with Propriety enough be considered as annexed to, and Parts of the Freehold. The Law will presume that it was the Intention of the Owner *under whose Bounty the Executor claimeth*, that they should be so considered; to the End that the House might remain to those, who, by Operation of Law or by his Bequest, should become intitled to it, in the same Plight he put it or should leave it, entire and undefaced. But in capital Cases, I am of Opinion, that such Fixtures which merely supply the Place of Chests and other ordinary Utensils of Household, should be considered in no other Light than as meer Moveables, partaking of the Nature of those Utensils and adapted to the same use.

Doctor CAMERON's Case.

PLEAS before our Lord the King at *Westminster* of *Easter* Term in the 26th Year of the Reign, &c.
Amongst the Pleas of the King Roll.

ENGLAND. Our present Sovereign Lord the King hath transmitted to his beloved and faithful Sir William Lee and others his Fellows Justices, &c. [as in the Case of Mr. Murray of Broughion, *mutatis mutandis*.]

DOCTOR

DOCTOR *Archibald Cameron*, who was one of the Persons attainted by the Act of the 19th of Geo. 2d. was on the seventeenth of *May* 1753, brought to the Bar by *Habeas Corpus* directed to the Lieutenant of the Tower; and being arraigned by the Secondary on the Crown Side, the Writ of *Mittimus* with the *Certiorari* and Return were read to him by the Secondary. The Attorney General then prayed that Execution might be awarded; and the Secondary demanded of the Prisoner what he had to say why Execution should not be done upon him.

THE Prisoner who, during the whole Time he stood at the Bar, behaved with great Propriety, not insensible of his Condition nor greatly disconcerted, said, that he was led to take a Part in the Rebellion against his own Judgment and Inclination, by some upon whom his all depended. That he still flattered himself he should appear not unworthy of his Majesty's Mercy; and mentioned some Facts which he hoped might intitle him to it. He said he did not offer these Things as a Defence he relied on in Point of Law, but as Facts which he hoped might have some weight in another Place, for he was determined to throw himself entirely on his Majesty's Mercy.

WHEREUPON Proclamation being made for Silence, the Chief Justice, after a short Exhortation to the Prisoner, pronounced the usual Judgment in Case of high Treason, *as an Award of Execution grounded on the Act of Attainder*. And a Rule was made for his Execution on the seventh of *June*, and Writs for that Purpose to the Lieutenant of the Tower and the Sheriff of *Middlesex* were ordered as in the Case of Mr. *Ratcliffe*.

And he was executed accordingly.

- 1. H. 7. 23.
- 25.
- 1. Sid. 72.
- 1. Lev. 61.
- 3. St. Tri.
- 855, 895.

THE Court in pronouncing Judgment in this Case followed the Precedents in the Cases of *Humphry Stafford*, and of *Barkstead*, *Okey* and *Corbet*. The Cases of *Holloway* and Sir *Thomas Armstrong* in *Charles* the 2d's Time, and of Lord *Griffin* in the late Queen's Time, were mentioned at a Conference among the Judges of the King's Bench on this Occasion; but little regard was paid to them.

FOR in *Holloway's*, which was the leading Case, the Opinion of the Court seemeth to have been given hastily and

and against the Sense of the Bar. And in Lord *Griffin's* Case Chief Justice *Holt*, who was at that Time absent, was of a contrary Opinion, and as I have heard, constantly persisted in it; and I do not see how an Attainder by Outlawry at Common Law, is, in this Respect, distinguishable from the Case of an Attainder by Act of Parliament, which, in the present Case, is but in Nature of a Parliamentary Outlawry.

INDEED in Cases within the Act of the 19th of Geo. 2. c. 34, where the Proceeding is upon a Suggestion on the Roll that the Prisoner did not surrender to Justice pursuant to that Act, the constant Course hath been to award Execution without pronouncing Sentence of Death as in Cases of Felony: but that Practice is grounded on the Words of the Act; "And it shall be lawful for the Court to award Execution against such Offender in such Manner as if he had been convicted and AT-TAINTED in the said Court."

THE Record in the Case of *Barkstead &c.* was searched, and the Judges had Copies of it. It is of *Easter* Term in the fourteenth of King *Charles* the Second; it agreeth *mutatis mutandis* with the Record in Mr. *Murray's* Case; and after setting forth the Act of Parliament by which the Prisoners stood attainted it proceedeth, *Et modo scilicet die Mercurii prox' post Quinden' Pasch' isto eodem Termino coram Domino Rege apud West' veniunt prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet, per Johannem Robinson Mil. & Bar. Locum tenent' Turris London', virtute Brevis Domini Regis de Habeas Corpus ei inde direct' ad Barram hic duct' in propriis Personis suis (in cujus Custod' præantea ex Causis prædict' commissi fuerunt) qui committuntur eidem Locum tenent' super quo quæsit' est per Cur' de eisdem Johanne Barkstead, Johanne Okey, & Milone Corbet, si quid pro se habeant, vel dicere sciant, quare Cur' hic ad Executionem de eis & eorum quolibet procedi non debeat, Separatim dicunt quod ipsi non sunt eadem Personæ, nec eorum aliquis est eadem Persona, quæ de aliâ Proditione prædict' in Actu Parlamenti prædict' Specificat' Convict' & Attinct' existunt; & hoc parat' sunt verificare prout Cur' &c. unde petunt Judicium &c. & Galfridus Palmer Mil. & Bar. Attornat' Domini Regis Generalis qui pro eodem Domino Rege in hac Parte sequitur*

sequitur præsens hic in Cur' pro eodem Domino Rege dicit, quod prædict' Johannes Barkstead, Johannes Okey, & Milo Corbet, modo comparent' sunt eadem Personæ, & quilibet eorum est eadem Persona in prædict' Actu Parliamento nominat' qui de altâ Proditione prædict' Convict' & Attinct' existunt, & hoc pro Domino Rege petit quod inquiretur per Patriam, & prædict' Johannes Barkstead, Johannes Okey, & Milo Corbet, similiter &c. Ideo immediate veniat inde Jurata coram Domino Rege ibidem &c. Et Juratores Juratæ prædict' per Vicecomit' Middlesex prædict' ad hoc impannellat' exact' veniunt, qui ad Veritatem de præmissis dicend, elect' triat' & jurat' dicunt super sacramentum suum, quod prædict' Johannes Barkstead, Johannes Okey, & Milo Corbet, sunt eadem Personæ, & quilibet eorum est eadem Persona in prædict' Actu Parliamento nominat' qui de altâ Proditione prædict' in Actu Parliamento prædict' Convict' & Attinct' existunt, prout prædict' Galfrius Palmer Mil. & Bar. Attornat' Domini Regis nunc General' pro dict' Domino Rege superius allegavit &c. & Ulterius quæsit' est de præfat' Johanne Barkstead, Johanne Okey, & Milone Corbet, separatim, si quid ulterius pro se habeant vel dicere velint necne, qui nihil dicunt &c. Ideo considerat' est quod prædict' Johannes Barkstead, Johannes Okey, & Milo Corbet, ducantur, & quilibet eorum ducatur usque Turrim London, & deinde per medium Civitat' London directe usque ad Furcas de Tyburn Trabantur, & quilibet eorum Trahatur & super Furcas illas ibidem Suspendantur & quilibet eorum Suspendatur, & Videntes ad Terram prosternantur, & quilibet eorum prosternatur, & Interiora sua extra Ventres suos & eorum cujuslibet capiantur, ipsisque Viventibus comburantur, & Capita eorum & eorum cujuslibet amputentur, & Corpora eorum & eorum cujuslibet, in quatuor Partes dividantur, & quod Capita & Quarteria illa ponantur ubi Dominus Rex ea assignare voluerit &c.

The Case of Lord GRIFFIN, from a MS. Report of the late Lord Chief Baron Dod.

Pasch. 7. Annæ 1708.

LORD *Griffin* who had been outlawed for high Treason, was this Term brought to the King's Bench; and the whole Record of the Indictment and Outlawry was read to him, and he was demanded if he had aught to say why Execution should not be done; and he not making any material Objection, the Court ordered Execution to be done. But note, Sir *James Montagu* Solicitor General (there being then no Attorney General) prayed that Judgment as in Case of high Treason might be pronounced; or that at least it might be entered on the Roll in the Award of Execution. And said this was the Opinion of *Holt*, Chief Justice, then at *Bath propter Aegritudinem*. But *Powell* and the Court held that the Award of Execution should be general; for the Judgment in the Outlawry implieth all the Particulars, and no second Judgment ought to be given. And so they said it was held in the Cases of *Holloway* and Sir *Thomas Armstrong*. *Mes per Auters dubitatur quia le Livre del 1. H. 7. fo. 24. est Contra*; and it was said that in the Case of *Barkstead, Okey and Corbet*, the Court followed the Precedent of that Book.

The Case of ELIZABETH HARRIS.

AT *Aylesbury*, Lent Assizes 1753, before Mr. Justice *Denison*, *Elizabeth Harris* a Girl of fourteen years of Age and of sufficient Understanding for her Years, was indicted for maliciously setting Fire to and burning a dwelling House in the Possession of *Edward Stokes*: and *Anne* the Wife of *William Course* was indicted as an Accessary to the Felony before the Fact.

THE Prisoner *Elizabeth* was the Daughter of the Prisoner *Anne* by a former Husband, *John Harris*. It appeared in Evidence at the Trial, that *John Harris* died seized of the Equity of Redemption of this House and of

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another

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another adjoining to it, subject to a Mortgage Term for 20 $\frac{1}{2}$ Years. And that the Equity descended to his eldest Son, a Child left with other Children under the Care of their Mother the Prisoner *Anne*; who was intitled to Dower out of these Houses, but no Dower was ever assigned. That *Anne* having the Care of her Son and his Estate, let these Houses to *Edward Stokes* at the Rent of 5 $\frac{1}{2}$ a Year, and received the Rent for some Time. But having a large Family of Children, she was obliged to ask relief of the Parish where she lived. That she was denied such Relief on Account of these Houses; the Parishioners insisting that the Overseers of the Poor should be let into the Receipt of the Rent, before she should be intitled to any parochial Relief. That thereupon she frequently declared she would set the Housing on Fire if the Parish did not relieve her; that she had young Children whom the Parish could not punish, though they might punish her; and she would order the least Child she had who could carry a Coal of Fire, to burn the Housing down. And many other Declarations of the like Kind she made, which discovered an obstinate Resolution in her to burn the Houses, rather than submit to the Terms the Parishioners insisted on.

It appeared further that the Prisoner *Elizabeth* set the House on Fire by the Direction of the Prisoner *Anne*, who went from Home on purpose to be absent at the Time the Fact was committed; and that no other House was burnt.

THE Jury found both the Prisoners guilty. But a doubt arising by Reason of the Interest the Prisoner *Anne* had in the House, Mr. Justice *Denison* thought proper to respite Judgment, in order to take the Opinion of the Judges on the Case.

JULY the 2^d 1753. At a Meeting of the Judges at the Chief Justice's Chambers it was unanimously agreed that both the Prisoners are guilty of Felony. The only Doubt was with Regard to the Interest the Prisoner *Anne* had in the House, and it was grounded on the Reasoning in *Holmes's* Case; for had she had such Estate in the House as would have cleared her of the Charge of Felony, the Prisoner *Elizabeth*, who acted by her Directions, could not have been guilty of Felony.

BUT

BUT all the Judges agreed that the Prisoner *Anne's* Title to Dower was not such an Interest as could bring her within the Rule in *Holmes's Case*. *Holmes* had the Possession by legal Title, and during the Continuance of his Lease could maintain his Possession against all Mankind; and therefore the House might in a limited Sense be called *his own*. But in the present Case, the Possession was in *Edward Stokes* under a Demise from *Anne* in Behalf of her Son, and subject to a yearly Rent which she received. And her title to Dower, had *Edward Stokes's* Interest been out of the Case, did not so much as give her a Right of Entry, it being a bare Right of Action.

Cro. Car.
376.
1. Hale. 568.

MR. Justice *Denison* said that he had no Doubt upon him from the Beginning. But it being a new Case, and some of the Bar being doubtful, he thought it advisable to take the Opinion of the Judges.

AT the next Assizes Judgment of Death was pronounced upon both the Prisoners, and *Anne* was Executed; but *Elizabeth* being young, and acting under her Mother's Direction was reprieved, and recommended to Mercy on Condition of Transportation.

It was said in the Debate of this Case by some of the Judges and not denied by any, that had *Anne* been seized of the Freehold and Inheritance of the House, and *Stokes* in Possession under a Lease, it would have been Felony in *Anne* to have burnt it: otherwise all Tenants and their Concerns would be very much at the Mercy of their Landlords.

THE Principle three of the Judges went upon in *Holmes's Case*, (for *Croke* did not concur in the Judgment) doth seem to warrant this Opinion. They considered the House then under Consideration as the Property of *Holmes*, as *his own House*, by reason of the Estate he had in it under his Lease. *Croke* did not dispute the Principle, but argued against the Conclusion the other Judges drew from it. And if this be so, I do not see why it may not with strict legal Propriety be said of a Reversioner, who should maliciously set Fire to Houses in the Possession of his Tenants under Leases from himself or his Ancestors, that he *Ædes alienas combussit*.

v. Rieu & Redley
13 R. 2. 17 & 2.

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THE Judgment in *Holmes's Case*, to say no more of it, was a very merciful Judgment. The House might with strict legal Propriety have been considered as the House of the Landlord. Both Landlord and Tenant have a Property, one temporary and limited, the other absolute and perpetual. Like the Bailee and the absolute Owner of Goods in the Case of Larceny.

The Case of ANNE LEWIS.

AT the Old Bayly Sessions in *Anne Lewis* was indicted on the Statute of the Second of Geo. 2^d. for feloniously uttering and publishing a certain false forged and counterfeit Deed, purporting to be a Power of Attorney from *Elizabeth Tingle* Administratrix of her Father *Richard Tingle* deceased, late a Marine belonging to his Majesty's Ship the *Hector*, to *Frederick Predham* of *Bernard's-Inn* Gentleman: empowering the said *Predham* to demand and receive of the Commissioners of his Majesty's Navy, or whom else it may concern, all Prize Money due unto her; with Intention to defraud *Edmund Mason*, the said *Anne* knowing the said Deed to be false, forged, and counterfeit.

THE Prisoner was convicted upon very full Evidence. But it appearing upon the Trial that *Richard Tingle*, to whom Administration had been taken in the Name of *Elizabeth* his supposed Daughter, died Childless and unmarried, a Doubt was conceived, whether since there never was such Person in *Rerum Naturâ* as *Elizabeth* the Daughter of *Richard*, the counterfeiting a Letter of Attorney in that Name and under that Description, be a Forgery within the Statute: and upon this Doubt Judgment was respited.

THIS Doubt arose from what Chief Justice *Coke* saith speaking of Forgery in his 3. Inst. 169. "This saith he, "is properly taken when the Act is done *in the Name of another Person.*"

FROM whence it was inferred, that there never having been such Person as *Elizabeth Tingle* the Daughter of *Richard*, the counterfeiting a Deed purporting to be executed

executed by such Person, cannot come within this Definition of the Offence; it is not an Act done in the *Name of another* Person.

It was admitted by the learned Judge who raised this Doubt, that an Alteration made in a Deed really executed, in order to give it an Operation different from the meaning of Parties, if it be done *Mala fide* and with an Intention to defraud, will come within the legal Notion of Forgery; as ante-dating a Deed of Conveyance in order to over-reach a former Deed; an Alteration in the Name and Description of the Premises conveyed, or in the Sum of Money secured by Bond or other Deed, or in the Estate intended to pass; these Alterations and others of the like Nature, made to the Prejudice of a third Person, and with a fraudulent Intention come within the Act on which the present Prosecution is founded; in like manner as they have been held to be within that of the 5th of *Eliz.* For in these Instances there was a *false making*, which is one of the Words descriptive of the Offence used in both the Statutes, that is the true Deed was falsified; but still, said he, there was a real Deed on which the Forgery did operate.

So in the Case of a Deed or Instrument totally forged, it was said by the same learned Judge that it must purport to be the Deed of some Person really existing, or that hath existed, whose Deed by Possibility might have been forged; otherwise it cannot be, according to *Coke's* Description of the Offence, "an Act done in *the Name of another* Person."

BUT at a Meeting of the Judges a few Days after *Trinity* Term 1754, at Lord Chief Justice *Ryder's* Chambers, eleven Judges being present, ten of them were very clear of Opinion that the Prisoner's Case is within the Letter and Meaning of the Act; and in that Opinion Chief Justice *Willes*, who was absent, signified his Concurrence by Letter communicated at that Meeting.

IN Support of this Opinion it was argued that Lord *Coke's* Description of the Offence on which the Doubt is grounded, is apparently too narrow. It expresseth the most obvious meaning of the Word, and taketh in that Species of Forgery which is most commonly practised; but there are other Species of Forgery which will not come within

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the Letter of that Description ; the Case of Ante-dating, and the other Cases which have been mentioned, and are admitted to come within the legal Notion of Forgery, are of that Kind.

THE Offence the Prisoner standeth charged with, is the publishing as true a certain false, forged and counterfeit Deed, purporting to be a Power of Attorney from *Elizabeth Tingle*, with an Intention to defraud, knowing it to be false. This is her Offence, and it is one of the Offences described in the Act. For it is to be observed, that the Act in describing the Offence doth not use the Words, *the Deed of any Person*, or the *Deed of another*, or any Words of the like Import, but any false Deed. Is the Deed in Question then a false Deed, or is it not ? undoubtedly it is. Was it published with an Intention to defraud ? It certainly was. This being so, it would sound very harsh to say, that the Prisoner's Case is not brought within the Letter and Meaning of the Act, because no such Person ever existed as *Elizabeth Tingle* the Daughter of *Richard* ; in other Words, because she with an Intention to defraud, published a Deed impossible to be true.

IT may be said, *Cui bono*, to what Purpose will it be to forge Deeds or other Instruments in the Names of Persons who never existed ? the naked State of the present Case answereth that Question. Letters of Administration to *Richard Tingle* had been taken out in the Name of *Elizabeth his supposed Daughter* ; by these Letters an Existence in Shew and Appearance is given to *Elizabeth* the Daughter ; and this was effected by a gross Imposition on the Court, and by down-right Perjury : so that here is a Title in Shew and Appearance established by Fraud and Perjury in a fictitious Person ; this Title is transferred in Shew and Appearance by the Deed stated in the Case ; and all this is done with Intent to defraud an innocent Person. Which clearly bringeth the Prisoner's Case within the Letter and Mischief of the Act. At the next Sessions at the *Old Bayly* (July 17th 1754.) the Prisoner had Judgment of Death.

Note. AFTER respiting Judgment in the Case of *Anne Lewis*, and before the Judges could meet by Reason of the late Chief Justice *Lee's* frequent Indisposition and Avocations,

tions, two other Cases of the like Kind and depending on the same Doubt, came before the Court at the *Old Bayly*, and Judgment was respited in them. But Judgment of Death was afterwards given in Conformity to the Opinion in *Anne Lewis's* Case.

MARY MITCHELL's Case.

AT the *Lent* Assizes 1754, for the County of *Kent*, *Mary Mitchell* was indicted on the Statute of the 7th of Geo. 2d. for feloniously uttering and publishing a certain false, forged and counterfeit Warrant and Order for the delivery of Goods; purporting to have been signed by one *George May*, knowing the same to be false, forged, and counterfeit, with Intent to defraud one *William Jefferys* of the several Goods mentioned in the Order. And upon very full Evidence she was found guilty. But Mr. Justice *Foster* before whom she was tried, thought it advisable to respite Judgment upon a Doubt, whether the Order set forth in the Indictment be such *Warrant or Order* as bringeth the Prisoner's Case within the Statute.

THE Prisoner, who was, or pretended to be intitled to parochial Relief in the Parish of *Maidstone*, went to the Shop of the said *William Jefferys* who sold Women's Apparel; and pretending that she came from the said *George May*, who was then an Overseer of the Poor of that Parish, produced to Mr. *Jefferys* the Order set forth in the Indictment; and desired him to let her have the several Things mentioned in the Order, upon the Credit of it. But *Jefferys* suspecting a Forgery, sent the Prisoner away, but kept the Order, and Mr. *May* having been spoken with, the Prisoner was soon afterwards secured.

The Order was to this Effect.

Mr. Jefferys,

OCT. 16th 1753.

I desire you to let this Woman have six Yards of ordinary Stuff, one Pair of Stockings, one Shift, one Apron, one Handkerchief and I will see it all paid for. Witness my Hand, George May.

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THE Doubt was, whether this Writing be such Warrant or Order for the Delivery of the Goods as bringeth the Case within the Meaning of the Act: since supposing it to have been genuine, it could have been considered in no other Light than as a Request from *May* for the Delivery of the Goods on his Credit, and an Undertaking on his Part to see them paid for. And upon a Conference among the Judges on the 5th of *July* 1754, at Lord Chief Justice *Ryder's* Chambers, nine of them were clearly of Opinion that this Writing is not a Warrant or Order for the Delivery of Goods within the Meaning of the Act. One doubted, but acquiesced; another dissented; Mr. Baron *Legge* was absent.

THOSE who took the Case to be out of the Act argued, that the Words *Warrant or Order* as they stand in the Act, are synonymous, and expressive of one and the same Idea; and in common Parlance import, that the Person giving such Warrant or Order hath, or at least claimeth an Interest in the Money or Goods which are the Subject-matter of that Warrant or Order: that he hath, or at least assumeth, a disposing Power over such Money or Goods; and taketh on him to transfer the Property, or Custody of them at least, to the Person in whose Favour such Warrant or Order is made. This they took to be the strict literal Construction of the Act. And though the present Case, and many other Cases of the like Kind mentioned in the Debate may come within the Mischiefs intended to be prevented, yet in the Construction of Acts so penal as this, the old Rule of adhering strictly to the Letter must not be departed from; and therefore the Prisoner ought to be discharged from this Indictment.

2d. of Geo.
2.

THE learned Judge who dissented, argued, that the Act of the 7th of Geo. 2d. on which the Question ariseth, was made on Purpose to take in the Cases which had not been provided for by the former Act: and therefore ought to receive a liberal Construction. That the Word, *Order*, is every Day used among Traders in a larger Sense than is now contended for. Letters or Messages between Dealers, where one desireth the other to send him a Quantity of Goods in the Way of Trade, they call *Orders*;

Orders; and yet the Person sending this Order hath no Interest in the Goods, no disposing Power over them, nor pretendeth to any.

THAT had the Paper in question been genuine and the Goods delivered on the Credit of it, *May* would have been liable: or had the Goods been delivered on the Credit of this Paper, *Jefferys* would have been defrauded.

He concluded therefore that as the present Case is within the Mischief intended to be prevented, and as he apprehended likewise within the Words of the Act, Judgment of Death ought to pass upon the Prisoner.

At the next Assizes the Prisoner was called up to the Bar, and Judgment was given, that she be discharged from this Indictment. And there being no other Charge against her, she was delivered out of Gaol.

The Case of M'DANIEL and Others.

AT the Old Bayly Session in December 1755, Justice *Foster* pronounced the Judgment of the Court in the Case between the King and *Macdaniel* and others, to the Effect following.

THE Indictment chargeth that at the general Gaol Delivery held at *Maidstone* in the County of *Kent*, on the 13th of *August* in the twenty eighth Year of Geo. 2d. *Peter Kelly* and *John Ellis* were by due Course of Law convicted of a Felony and Robbery committed by them in the King's Highway in the Parish of *Saint Paul Deptford* in the County of *Kent*, upon the Person of *James Salmon* one of the Prisoners at the Bar, and that the Prisoners *Stephen Macdaniel*, *John Berry*, *James Eagen*, and *James Salmon* before the said Robbery, did in the Parish of *Saint Andrew Holbourn* in this City, feloniously and maliciously comfort, aid, assist, abet, counsel, hire, and command the said *Peter Kelly* and *John Ellis* to commit the said Felony and Robbery.

ON this Indictment the Prisoners have been tried and the Jury have found a special Verdict to this Effect.

THAT *Kelly* and *Ellis* were by due Course of Law convicted of the said Felony and Robbery.

THAT

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THAT before the Robbery, all the Prisoners and one *Thomas Blee*, in order to procure to themselves the Rewards given by Act of Parliament for apprehending Robbers on the Highway, did maliciously and feloniously meet at the *Bell Inn* in *Holbourn* in this City; and did then and there agree that the said *Thomas Blee* should procure two Persons to commit a Robbery on the Highway in the Parish of *Saint Paul Deptford*, upon the Person of the Prisoner *Salmon*.

THAT for that Purpose they did all maliciously and feloniously contrive and agree, that the said *Blee* should inform the Persons so to be procured, that he would assist them in stealing Linen in the Parish of *Saint Paul Deptford*.

THAT in pursuance of this Agreement and with the Privity of all the Prisoners, the said *Blee* did engage and procure the said *Ellis* and *Kelly* to go with him to *Deptford* in order to steal Linen; but did not at any Time before the Robbery inform them or either of them of the intended Robbery.

THAT in consequence of the said Agreement at the *Bell*, and with the Privity of all the Prisoners, the said *Ellis* and *Kelly* went with the said *Blee* to *Deptford*.

THAT the said *Blee*, *Ellis*, and *Kelly* being there, and the Prisoner *Salmon* being likewise there waiting in the Highway in pursuance of the said Agreement, the said *Blee*, *Ellis*, and *Kelly* feloniously assaulted him and took from his Person the Money and Goods mentioned in the Indictment.

THEY further find that none of the Prisoners had any Conversation with the said *Ellis* and *Kelly* or either of them previous to the Robbery. But they find that before the Robbery, the Prisoners *Macdaniel*, *Eagen*, and *Berry* saw the said *Ellis* and *Kelly*, and approved of them as Persons proper for the Purpose of robbing the said *Salmon*.

BUT whether the Prisoners are guilty in manner as charged in the Indictment, they pray the Advice of the Court.

THIS special Verdict hath been argued before all the Judges of *England*, and two Questions have been made.

FIRST,

FIRST, whether it appeareth from the Facts stated in the special Verdict, that any Robbery was committed by *Ellis* and *Kelly* on the Person of *James Salmon*.

SECOND, supposing that *Ellis* and *Kelly* were guilty as Principals in the Robbery, whether the Facts found will warrant the Court in passing Judgment upon the Prisoners or any of them upon this Indictment.

THE second Point seemeth to have been the Doubt on which the Jury pray the Advice of the Court; and I have Reason to believe that when it first came to be considered, it was Matter of great Doubt with some Gentlemen of the Profession whose Abilities were never yet called in question.

FOR which Reason, and because the Law touching Accessories before the Fact is a Matter of great and very extensive Consequence to the Justice of the Kingdom and ought to be well understood, I will deliver my Thoughts upon the second Question before I come to that which will finally govern the present Case.

As to the Prisoner *Salmon*, the Judges upon Consideration of this special Verdict are unanimously of Opinion, that he cannot be guilty within this Indictment: for unless he was Party to the Agreement at the *Bell*, there can be no Colour to involve him in the Guilt of *Ellis* and *Kelly*.

AND on the other Hand, if he did part with his Money and Goods in Consequence of that Agreement, it cannot be said that in legal Construction he was robbed at all: since it is of the Essence of Robbery and Larceny, that the Goods be taken *against the Will of the Owner*.

THERE was a late Case cited in the Argument on the Part of the Crown, which I shall consider by and by, and distinguish from the present.

IT hath been held, and I think rightly, that a Man may make himself an Accessary after the Fact to a Larceny of his own Goods, or to a Robbery on himself, by harbouring or concealing the Thief, or assisting in his Escape. Cromp. Just.
41. b. pl. 4. 5.

AND under some Circumstances a Man may be guilty of Larceny in stealing his own Goods, or of Robbery, in taking his own Property from the Person of another. *A.* delivereth Goods to *B.* to keep for him, and then stealeth them, 1. Hale 513.

Stanf. 26. A.
3. Inst. 110.

them, *with Intent to charge B. with the Value of them*, this would be Felony in *A.* or, *A.* having delivered Money to his Servant to carry to some distant Place, disguiseth himself and robbeth the Servant on the Road, *with Intent to charge the Hundred*, this, I doubt not, would be Robbery in *A.*

FOR in these Cases the Money and Goods were taken from those who had a *special temporary Property* in them, with a wicked fraudulent Intention; which is the antient known Definition of Larceny, *Fraudulenta Obtrectatio rei alienæ invito Domino*. But I never did hear before this Time, of any attempt to charge a Man as Accessary before the Fact to a Robbery committed on his own Person.

As to the Prisoners *Macdaniel*, *Berry*, and *Eagen*, the Judges are unanimously of Opinion, that supposing a Robbery was committed on *Salmon*, the Facts found by the special Verdict are sufficient to charge them as Accessaries in the Manner they are charged in this Indictment.

For the Verdict findeth that every Circumstance attending the Fact, the Place where, and the Person on whom it was to be committed, the Means by which it was to be effected, and the Persons by whom it was to be done; all these Circumstances were settled and agreed upon by the Prisoners previous to the Fact. And in Consequence of this Consult and Agreement the Fact was committed.

IT is indeed found that none of the Prisoners had any Conversation with *Ellis* and *Kelly* previous to the Robbery; and that *Blee* did not acquaint *Ellis* and *Kelly* with his Intention to commit any Robbery, but drew them to *Deptford* under Pretence of stealing Linen.

THESE Circumstances seem to have been the Foundation of the Jury's Doubt; and the Prisoners Council have laid great Strefs on them.

As to that Circumstance that *Blee's* true Design was not made known to *Ellis* and *Kelly*, it appeareth manifestly by the Facts found, that it was Part of the original Agreement at the *Bell* that the *true Design should be concealed from them*; and that they were to be drawn to the Place of Action under another Pretence. This Circumstance therefore, being Part of the original Agreement, the Prisoners cannot avail themselves of it, if the Agree-
ment

ment upon the Whole and what was done in Consequence of it be sufficient to make them Accessaries.

As to the other Circumstance, that the Prisoners had no Conversation with *Ellis* and *Kelly* before the Assault upon *Salmon*, their Council relied chiefly on the Words of the Statutes on which this Indictment is founded.

THE Statutes are the 4th and 5th of *Pb.* and *Ma.* and the 3. and 4. *W.* and *Ma.* The Words of the former which are descriptive of the Offence are, "if any Person shall maliciously counsel, hire, or command." 4. 5. Ph. M.
c. 4.
3. 4. W. M.
c. 9.

The latter retaineth the Words counsel, hire, or command, and addeth others, "shall comfort, aid, abet, or assist." From these Words, which it must be admitted are descriptive of the Offence, the Prisoners Council concluded that without a personal immediate Communication of Counsels, Intentions, and Views, from the supposed Accessaries to the Principals, there can be no Accessary before the Fact.

BUT the Judges are all of Opinion, that whoever procureth a Felony to be committed, though it be by the Intervention of a third Person, is an Accessary before the Fact, and within these Statutes. For what is there in the Notion of commanding, hiring, counselling, aiding, or abetting, which may not be effected by the Intervention of a third Person, without any direct immediate Connection between the first Mover and the Actor.

A. biddeth his Servant hire somebody, no Matter whom, to Murder *B.* and furnisheth him with Money for that Purpose; the Servant procureth *C.* a Person whom *A.* never saw, or heard of, to do it. Is not *A.* who is manifestly the first Mover or Contriver of the Murder an Accessary before the Fact? it would be a Reproach to the Justice of the Kingdom to suppose he is not.

It is a Principle in Law which can never be controverted that he who procureth a Felony to be done is a Felon. If present he is a Principal, if absent an Accessary before the Fact.

IN the Case of the Earl of *Somerset*, who was indicted upon the Statute of *Pb.* and *Ma.* as an Accessary before the Fact to the Murder of Sir *Thomas Overbury*, the Lord Chancellor *Ellesmere* High Steward, in the Outset of the Cause and before any Evidence given, directed the Peers
Triers,

Triers, and all the Judges present concurred with his Lordship, that the only Point in Issue was, *whether the Earl caused or procured the Murder or not.* And accordingly the Earl was found guilty upon Evidence which satisfied his Peers, that he had contributed to the Murder by the Intervention of his Lady, and of Sir *Jarvis Elwys*, and *Franklin*, who were themselves no more than Accessaries; without any Sort of Proof that he had ever conversed with *Weston*, the only Principal in the Murder, or had corresponded with him directly by Letter or Mes- sage.

THE best Writers on the Crown Law agree that Persons procuring or even consenting before-hand, are Accessaries before the Fact.

LORD *Coke* in his Comment on *West.* 1. c. 14. in explaining the Words *Commandment* and *Aid* as applied to Accessaries before the Fact, saith, "Under this Word *Command* are comprehended all those who incite, procure, set on, or stir up any, to do the Fact. And "under the Word *Aid* are comprehended all Persons "counselling, abetting, plotting, assenting, consenting, "and encouraging to do the Fact, and not present when "it is committed."

1. Hale 37 4.

Id. 615. 6 16.

LORD *Hale* saith, "Misprision of Felony is conceal- ing a Felony which a Man knoweth but never consent- ed to; for *if he consented he is either Principal or Ac- cessary.* Again, Accessary before, is he that being ab- sent at the Time of the Felony committed, doth yet "procure, counsel, or abet another, to commit the Fe- lony."

MANY Authorities to this Purpose may be cited which for Brevity Sake I will barely refer to.*

It was objected by the Prisoners Council that Penal Statutes are to be construed with great Strictness; and that the Words *procure* or *consent* are not to be found in either of the Statutes upon which this Indictment is formed.

THE Principle is true, that in Prosecutions on penal Statutes the Words of the Statute are to be pursued. But it is equally true, that we are not to be governed by the

* See *Stanf.* 40. *Lambard.* 157. *Dalt.* c. 161. S. 5. And see *Co. Ent.* Appeal pl. 5. 6. *Dyer* 120. 186. 1. And. 195. *Rastal* Appeal pl. 15. Precedents of Appeals, and Indictments against Accessaries before the Fact, all charging them as Procurers of the Felony.

Sound, but by the well-known, true, legal Import of the Words.

SOME of the Words made use of in the present Indictment and in one or other of the Statutes upon which it is founded are, *command*, *aid*, and *abet*. The Passage I have just cited from Lord *Coke* sheweth that Persons procuring, contriving, or consenting, come within the Words aid and command. And that Persons procuring are, in the Language of the Law, Abettors, may be proved by many Authorities which it is not necessary to cite at large.*

THIS being so, the Prisoners *Macdaniel*, *Eagen*, and *Berry*, who were the Contrivers of this Scene of Iniquity, agreed upon the Place and Manner of Execution, and conducted the Whole by the Intervention of their Instrument *Blee*, are Accessaries before to this Robbery, supposing a Robbery was committed. For in Construction, and indeed in the Language of the Law, they did command *Ellis* and *Kelly* to commit the Fact, and did aid and abet them in it.

I come now to the other Question, whether upon the State of the Case in the Special Verdict, any Robbery, in the legal Notion of that Offence, was committed on *Salmon* or no.

AND the Judges are of Opinion that it doth not appear, from the Facts stated in the Verdict, that the taking the Money and Goods from *Salmon* by *Ellis* and *Kelly* doth amount to a Robbery, in the legal Notion of that Offence.

SOMETHING was said in arguing of this Case upon the Question, how far a Person charged as an Accessary and brought to his Trial after the Conviction of the Principal, can controvert the Truth of the Fact found by the Verdict against the Principal; or how far the supposed Accessary can be let in to shew, either that no Felony was committed, or that the Person convicted as Principal was not guilty of it.

THIS general Question is of great Extent and of mighty Importance in Prosecutions of this Kind; and some diversity of Opinion there is among the Judges upon it.

* See *Rastall's Terms le Ley*. V. Abettors *Stanford* L. 3. c. 11. *Westm.* 2. c. 12. *Rastall's Ent.* fo. 43. b. 44. a. *Dyer* 120.

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BUT it will not be necessary at present to enter at all into it. Because the Court in the present Case must find it's Judgment upon the Facts found by the Verdict, and upon them alone. Now it is expressly found that *Salmon* was Party to the original Agreement at the *Bell*; that he consented to part with his Money and Goods under Colour and Pretence of a Robbery; and that for that Purpose, and in Pursuance of this Consent and Agreement, he went to *Deptford*, and waited there 'till this colourable Robbery was effected.

THIS being the State of the Case with Regard to *Salmon*, the Judges are of Opinion that in Consideration of Law, no Robbery was committed on him. His Property was not taken from him *against his Will*.

IT was said by the Prisoners Council that the Verdict doth not find, that *Salmon* was put in Fear; and, say they, there can be no Robbery without the Circumstance of putting in Fear.

I think the Want of that Circumstance alone ought not to be regarded. I am not clear that that Circumstance is of Necessity to be laid in the Indictment, so as the Fact be charged to be done *Violentè et Contra Voluntatem*. I know there are Opinions in the Books which seem to make the Circumstance of Fear necessary, but I have seen a good MS. Note of an Opinion of Lord *Holt* to the contrary. And I am very clear that the Circumstance of actual Fear at the Time of the Robbery need not be strictly proved. Suppose the true Man is knocked down without any previous Warning to awaken his Fears, and lieth totally insensible while the Thief rifeth his Pockets, is not this a Robbery? and yet where is the Circumstance of actual Fear? or suppose the true Man maketh a manful Resistance but is overpowered and his Property taken from him by the meer Dint of superior Strength, this doubtless is a Robbery. And in Cases where the true Man delivereth his Purse without Resistance, if the Fact be attended with those Circumstances of Violence or Terror which in common Experience are likely to induce a Man to part with his Property for the Safety of his Person, that will amount to a Robbery. And if Fear be a necessary Ingredient, the Law, *in Odium Spoliatoris*,

Spoliatoris, will presume Fear where there appeareth to be so just a Ground for it.

I come now to the Case I promised at the Beginning to consider and to distinguish from the present Case. One *Norden* having been informed that one of the early Stage Coaches had been frequently robbed near the Town by a single Highwayman, resolved to use his Endeavours to apprehend the Robber. For this Purpose he put a little Money and a Pistol into his Pocket, and attended the Coach in a Post Chaise, 'till the Highwayman came up to the Company in the Coach and to him, and presenting a Weapon demanded their Money. *Norden* gave him the little Money he had about him, and then jumped out of the Chaise with his Pistol in his Hand; and with the Assistance of some others took the Highwayman.

THE Robber was indicted about a Year ago in this Court for a Robbery on *Norden* and convicted. And very properly in my Opinion, was he convicted.

BUT that Case differeth widely from the present. In that Case, *Norden* set out with a laudable Intention to use his Endeavours for apprehending the Highwayman, in Case he should that Morning come to rob the Coach, which *at that Time was totally uncertain*; and it was equally uncertain whether he would come alone or no. In the Case now under Consideration, there was a most detestable Conspiracy between *Salmon* and the rest of the Prisoners that his Property should be taken from him under the Pretence and Shew of a Robbery: and Time, Place, and every other Circumstance were known to *Salmon* beforehand, and agreed to by him.

IN *Norden's* Case, there was no concert, no Sort of Connexion between him and the Highwayman; nothing to remove or lessen the Difficulty or Danger *Norden* might be exposed to in the Adventure. In the present Case, there was a Combination between *Salmon* and one at least of the supposed Robbers, I mean *Blee*. And though *Salmon* might not know the Persons of *Ellis* and *Kelly*; yet he well knew that they were brought to the Place by his Friend *Blee*, and were wholly under his Direction.

So widely do these Cases differ.

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To conclude, all the Prisoners have been guilty of a most Wicked and detestable Conspiracy to render a very salutary Law subservient to their vile corrupt Views. But great as their Offence is, it doth not amount to Felony. And therefore the Judgment of the Court is, that they be all discharged of this Indictment.

A Bill of Indictment was afterwards found against all the Prisoners, and prosecuted at the Expence of the Crown upon the Representation of the Judges, for a Conspiracy, in which the principal Facts found by the special Verdict on the Felony Bill were charged. On this Indictment they were all convicted: and the Court gave Judgment, that they be all set in and upon the Pillory twice; that they stand committed for seven Years, and until they find Sureties for their good Behaviour for three Years afterwards.

ONE of them (*Eagen*) lost his Life in the Pillory through the Resentment of the Populace. And on that Account the others did not stand a second Time. But they are all in *Newgate* very closely confined under their Sentence.

What follows
was not deli-
vered in Court.

IN the Case cited in the marginal Note p. 126. from 1. *And*. 195. the Indictment was held to be sufficient though the Words of the Statute of *Ph.* and *Ma.* were not pursued; the Words *Excitavit*, *Movit*, and *Procuravit*, being deemed Tantamount to the Words of the Statute, and descriptive of the same Offence.

I take this Case to be good Law, though I confess it is the only Precedent I have met with, where the Words of the Statute have been totally dropped. And I the rather incline to this Opinion, because I observe that the Legislature in Statutes made from Time to Time concerning Accessaries before the Fact, hath not confin'd itself to any certain Mode of Expression; but hath rather chosen to make use of a Variety of Words, all terminating in the same general Idea.

^a 3 1. Eliz. c.

12. S. 5.

21. Jac. c. 6.

^b 23. H. 8. c.

1. S. 3.

^c 1. Ed. 6. 12.

S. 13.

^d 4. 5. Ph. M.

SOME ^a Statutes make Use of the Word Accessaries, singly, without any other Words descriptive of the Offence, others ^b have the Words, Abettment, Procurement, helping, maintaining and counselling, or, ^c Aiders, Abettors, Procurers, and Counsellors. One ^d describeth the Offence by the Words, Command, Counsel, or Hire, another

another • calleth the Offenders, Procurers, or Acces- • 39. Eliz. 9.
saries. One, ^f having made Use of the Words, Comfort, S. 2.
Aid, Abet, Assist, Counsel, Hire, or Command, imme- ^f 3. 4. W. M.
diately afterwards in describing the same Offence in ano- c. 9.
ther Case, useth the Words Counsel, Hire, or Command,
only. • One Statute calleth them Counsellors and Con- • 1. A. St. 2.
trivers of Felonies; and many others make Use of the c. 9.
Terms Counsellors, Aiders, and Abettors, or barely
Aiders, and Abettors.

FROM these different Modes of Expression all plainly descriptive of the same Offence, I think one may safely conclude that in the Construction of Statutes which oust Clergy in the Case of *Participes Criminis*, we are not to be governed by the bare Sound, but by the true legal Import of the Words. And also that every Person who cometh within the description of these Statutes, various as they are in Point of Expression, is in the Judgment of the Legislature an Accessary before the Fact; unless he is present at the Fact, and in that Case he is undoubtedly a Principal.

Two of these Miscreants, *Macdaniel* and *Berry*, together with one *Mary Jones*, were afterwards indicted for Murder upon a Conspiracy of the like Nature against one *Kidden*; who was convicted and executed for a Robbery on the Highway, upon the Evidence of *Berry* and *Jones*.

UPON this Indictment they were tried and the special Matter being set forth in the Indictment, the Court suffered them to be convicted, but immediately respited Judgment; in order that the Point of Law might be more fully considered upon Motion in Arrest of Judgment. But the Attorney General declining to argue the Point of Law, the Prisoners were at a subsequent Session discharged of that Indictment.

THIS Prosecution, I am satisfied, arose from a laudable Zeal for keeping the Fountains of Justice pure and unpolluted, and a just Indignation against an Offence of this signal Enormity.

It must be confessed that there are strong Passages in our ancient Writers which greatly countenance a Prosecution of this Kind. But those Writers must always be read with great Caution upon the Subject of Homicide.

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BRACTON, whom the Writers of that Age for the most part follow, was a Doctor of both Laws before he came to the Bench. It is no Wonder therefore that having before him no tolerable System of the *English* Law, then in it's infant State, he should adopt what he found in the Books of the civil and canon Law, which he had read and seemeth to have well understood. *

SUCCEEDING Writers of that Age refined upon him, and in their loose Way wrote upon the Subject rather as Divines and Casuists than as Lawyers; and seem to have considered the Offence meerly in the Light in which it might be supposed to be considered in *Foro Cæli*.

BUT the Practice of many Ages backwards doth by no Means countenance their Opinion.

AND during all the Violence and Rage of the Prosecution against Dr. *Oates*, it seemeth not to have entered into the Imagination of those concerned in it, or of the Court, who would not have spared him if they could have taken their full Blow at him, that the Offences of which he was convicted could have been so charged as to have reached his Life. Though the Judgment they passed on him, the most cruel I believe that ever was given in *Westminster Hall* in Case of a Misdemeanour, might probably have ended in his Death. †

RICHARD MASON'S Case.

AT *Winchester* Summer Assizes 1756, *Richard Mason* was indicted before Mr. Serjeant *Willes*, who went Judge of Assize that Circuit, for the wilful Murder of *William Mason* his Brother; and was upon full Evidence convicted to the Satisfaction of the Serjeant, and Judgment of Death passed on him. But the Serjeant being informed that some Gentlemen of Rank at the Bar doubted, whether upon the Circumstances given in Evidence the Offence amounted to Murder or Manslaughter, he respited Execution 'till the Opinion of the Judges could be taken upon the Case, which he reported to have been as followeth.

* See Dig. L. 48. Tit. 8. *ad Legem Corneliam de Sicariis*. L. 9. Tit. 2. *ad Legem Aquiliam*. And the Writers on the Canon Law, collected by *Linwood* L. 1. Tit. 11. V. *Ne Occides*.

† See 4. St. Tri. The Proceedings against him and what fell from the Court at the Time of giving Judgment.

THE Prisoner, with the deceased and another Brother and some Neighbours were drinking in a friendly Manner at a publick House ; 'till growing warm in Liquor, but not intoxicated, the Prisoner and deceased began in idle Sport to pull and push each other about the Room. They then wrestled one Fall, and soon afterwards played at Cudgels by Agreement.

ALL this Time no Tokens of Anger appeared on either Side, 'till the Prisoner in the Cudgel Play gave the Deceased a smart Blow on the Temple. The Deceased thereupon grew Angry, and throwing away his Cudgel, closed in with the Prisoner, and they fought a short Space in good Earnest : but the Company interposing they were soon parted.

THE Prisoner then quitted the Room in Anger ; and when he got into the Street was heard to say " Damnation seize me if I do not fetch something and stick him." And being reprov'd for using such Expressions, answered " I'll be damned to all Eternity if I do not fetch something and run him through the Body."

THE Deceased and the rest of the Company continued in the Room where the Affray happened : and in about half an Hour the Prisoner returned, having put off a slight thin Coat he had on when he quitted the Room, and put on one of a Coarse thick Cloth. The Door of the Room being open into the Street, the Prisoner stood leaning against the Door-Post, his Left Hand in his Bosom and a Cudgel in his Right, looking in upon the Company, but not speaking a Word.

THE Deceased seeing him in that Posture invited him into the Company ; but the Prisoner answered " I will not come in," Why will you not ? said the Deceased, the Prisoner replied " Perhaps you will fall on me and beat me," the Deceased assured him he would not, and added " besides you think yourself as good a Man as me " at Cudgels, perhaps you will play at Cudgels with me." The Prisoner answered " I am not afraid to do so if you will keep off your Fists."

UPON these Words the Deceased got up and went towards the Prisoner, who dropt the Cudgel as the Deceased was coming up to him. The deceased took up the Cud-

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gel and with it gave the Prisoner two Blows on the Shoulder. The Prisoner immediately put his right Hand into his Bosom, and drew out the Blade of a Tuck-Sword, crying "Damn you stand off or I'll stab you;" and immediately, without giving the Deceased Time to step back, made a Pass at him with the Sword, but missed him. The Deceased thereupon gave back a little, and the Prisoner shortning the Sword in his Hand, leaped forward toward the Deceased, and stabbed him to the Heart, and he instantly died.

THE Judges having had Copies of the Case left at their Chambers met in *Michaelmas* Vacation at Lord *Mansfield's* Chambers and unanimously agreed, that there are in this Case so many Circumstances of deliberate Malice and deep Revenge on the Defendant's Part, that his Offence cannot be less than wilful Murder. He vowed he would fetch something to stick *him* to run *him*, through the Body. Whom did he mean by *him*? Every Circumstance in the Case sheweth he meant his Brother. He returned to the Company provided to Appearance with an ordinary Cudgel, as if he intended to try Skill and Manhood a second Time with that Weapon. But the deadly Weapon was all the while carefully concealed under his Coat; which most probably he had changed for the Purpose of concealing the Weapon.

HE stood at the Door refusing to come nearer, but artfully drew on the Discourse of the past Quarrel; and as soon as he saw his Brother disposed to engage a second Time at Cudgels, he dropped his Cudgel and betook him to the deadly Weapon, which 'till that Moment he had concealed.

HE did indeed bid his Brother stand off; but he gave him no Opportunity of doing so before the first Pass was made. His Brother retreated before the second, but he advanced as fast, and took the Revenge he had vowed.

THE Circumstance of the Blows before the Sword was produced, which I presume might weigh with the Gentlemen who doubted, altereth not the Case at all, nor doth the precedent Quarrel: because all Circumstances considered, he appeareth to have returned with a deliberate Resolution to take a deadly Revenge for what had past: and

and the Blows were plainly a Provocation *sought* on his Part, that he might execute the wicked Purpose of his Heart, with some Colour of Excuse.

He was soon afterwards Executed.

SEE *Hale's Sum.* 48. and 1 *Hale* 457, two Cases of Provocations *sought* adjudged Murder; though coming far short of this in Point of Malignity.

The Case of RICHARD CURTIS.

HE was indicted at the Summer Assizes 1756 for the Town and County of *Newcastle upon Tyne*, for the Murder of *William Atkinson*.

UPON the Trial the Case appeared to be, that a Process in the Nature of a *Capias ad Satisfaciendum* issued against one *Charles Cowling* out of the Town Court, directed to *Joseph Dixon* a Serjeant at Mace belonging to the Court; who got *John Suretees* another Serjeant at Mace to go and execute it for him. *Suretees* accordingly went to *Cowling's* Work-shop adjoining to his House, and taking hold of him told him that he had an Execution against him. *Cowling* demanded a Sight of the Process; which being refused, *Cowling* with the Assistance of the Prisoner by Force and Violence rescued himself.

SURETEES immediately acquainted *Dixon* with what had happened; and thereupon *Dixon* prevailed upon the Mayor's Officer to insert the Name of *Suretees* in the Process: and *Suretees* then went before a Justice of the Peace for the Town and County and made Information on Oath, that he did by Virtue of the said Process to him and *Joseph Dixon* directed, apprehend the said *Cowling*, who by wrestling and Strokes got out of his Hands and made his Escape.

THE Justice thereupon granted a Warrant directed to all Serjeants at Mace, Constables, and other Officers within the said Town and County, reciting the Process already mentioned; that *Suretees* had that Day arrested *Cowling* by Virtue thereof, and that *Cowling* had by wrestling and Strokes rescued himself, and commanding all Officers, &c. to apprehend the said *Cowling* and to bring him before the

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Justice who granted the Warrant, or any other Justice of the Peace of the Town and County, to be dealt with in the Premises as the Law directeth.

UPON the Receipt of this Warrant, *Dixon* and *Suretees* (who were both Serjeants at Mace) went back to *Cowling's* Work-shop, taking with them the Deceased and one *Coulson* as their Assistants. They found the Shop Doors shut, and calling to *Cowling*, who was there with the Prisoner, informed him that they had an Escape Warrant against him, and required him to surrender; otherwise they said they would break open the Door.

COWLING refused to surrender; and the Prisoner looking out at the Window with an Ax in his Hand, swore that the first Man that entered should be a dead Man. *Dixon* however with *Coulson* and the Deceased broke open the Shop Door; and the Deceased being foremost in entering the Shop, the Prisoner at one Blow with the Ax on the left Side of the Head, killed him on the Spot.

UPON this Evidence the Prisoner was found guilty of wilful Murder. But some Gentlemen of the Profession, expressing their Doubts to the Judge who tried him, he respited Execution 'till the Opinion of the other Judges could be had on the Case.

IN *Trinity Term* 1757, eleven of the Judges had a Conference on the Case, and nine of them, with whom Justice *Wilmot* who was absent concurred, were clearly of Opinion that the Defendant is guilty of Murder. Two of the Judges held it to be Manslaughter. All the Judges present at the Conference agreed that the Justice's Warrant, though obtained by very unwarrantable Practice on the Part of *Dixon*, and by Perjury on the Part of *Suretees*, was a legal Warrant for the arresting *Cowling* for a Breach of the Peace. For in Cases wherein the Justice of the Peace hath Jurisdiction, and in this he undoubtedly had, the Legality of his Warrant will never depend on the Truth of the Information whereon it is grounded.

THEY likewise agreed that Peace-Officers having a legal Warrant to arrest for a Breach of the Peace, may break open Doors after having demanded Admittance and given due Notice of their Warrant.

THE Point on which they divided was, whether in this Case such due Notice had been given.

THE nine Judges were of Opinion that no precise Form of Words is required in a Case of this Kind. It is sufficient that the Party hath Notice that the Officer cometh not as a meer Trespasser, but claiming to act under a proper Authority. And if after this Notice, he be resisted and he or any of his Assistants killed in Consequence of such Resistance, it will be Murder; provided it cometh out in Evidence *that the Officer had a legal Warrant.*

THE Person making such Resistance after such Notice, doth it at his own Peril. He acteth avowedly and deliberately in Defiance of the ordinary Course of Justice. And therefore it will be no Excuse on his Part to say, that he did not know or believe that the Officer came armed with a proper Authority. This Rule is founded on the Policy of the Law, and upon every Principle of Government.

THE Judges who differed, thought that the Officers ought to have declared, in an explicit Manner, what Sort of Warrant they had.

THEY said that an Escape doth not *ex Vi termini*, nor in the Notion of Law, imply any Degree of Force or Breach of the Peace: and consequently the Prisoner had not due Notice that they came under the Authority of a Warrant grounded on a Breach of the Peace. And for want of this due Notice the Officers are not to be considered as acting in Discharge of their Duty, but as meer Trespassers.

On this Question alone the Case turned.

BUT a few of the Judges who conceived the Fact to be Murder, were of Opinion that it would have been so, even admitting that the Officers could not have justified the breaking open the Door. Here was no Arrest actually made, the Officers even admitting that due Notice had not been given, had committed a bare Trespass in the House of *Cowling*, where the Prisoner happened to be; no Trespass done to the Property of the Prisoner, no Attempt on his Person.

BUT admitting that a Trespass in the House with an intent to make an unjustifiable Arrest on the Owner, could be considered as some Provocation to a Stander by; yet surely the knocking a Man's Brains out, or cleaving him down

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down with an Ax on so slight a Provocation, favoureth rather of brutal Rage, or, to speak more properly, of diabolical Mischief, than of human Frailty. And it ought always to be remembered, that in all Cases of Homicide on sudden Provocation, the Law indulgeth to human Frailty, *and to that alone.*

BESIDES, the Circumstance of the Prisoner's standing with the Ax in his Hand, declaring before any Attempt to enter the Shop, "That the first Man that did enter should be a dead Man"—sheweth it to be an Act of Deliberation as well as Cruelty.

AND where the Circumstances of Deliberation and Cruelty concur, as they do in this Case, the Fact is undoubtedly Murder; as flowing from a wicked Heart, a Mind grievously depraved, and acting from Motives highly Criminal. Which is the genuine * Notion of Malice in our Law.

Cro. Car.
371.
Jones (W.)
346.
Kell. 59.

IN the Cases of Sir *H. Ferrers's* Servant and of *Hopkin Hugget* which were mentioned on this Occasion, there was a mutual Combat, Blows given or Passes made on each Side; the Parties fought upon equal Terms, and when that is the Case, be the original Provocation ever so slight, every Blow or Pass becometh a fresh Provocation. The Blood kindleth every Moment, and in the Tumult of the Passions the Voice of Reason is not heard.

L^d Raym.
1296.

I must confess that the Circumstance of a mutual Combat was wanting in the Case of the Queen against *Tooley* and others, which was likewise mentioned on this occasion: But that Case, I speak it with great Deference, standeth as I conceive, on no better † Grounds than the Opinion of seven learned Judges against five.

*In the Case of Earl FERRERS,
April 17. 1760.*

See the printed Trial.

THE House of Peers unanimously found Earl *Ferrers* guilty of the Felony and Murder whereof he stood indicted; and the Earl being brought to the Bar, the High Steward acquainted him therewith; and the House imme-

* See Discourse the 2^d towards the Beginning.

† See the Discourse on Homicide, Chap. 8. Sect. 10.

diately

diately adjourned to the Chamber of Parliament. And having put the following Questions to the Judges adjourned to the next Day.

1st, "WHETHER a Peer indicted of Felony and Murder, and tried and convicted thereof before the Lords in Parliament, ought to receive Judgment for the same according to the Provisions of the Act of Parliament of the 25th Year of his * Majesty's Reign, intituled, *an * Geo. 2^d. Act for better preventing the horrid Crime of Murder.*

2d, "SUPPOSING a Peer so indicted and convicted ought by Law to receive such Judgment as aforesaid, and the Day appointed by the Judgment for Execution should lapse before such Execution done, whether a new Time may be appointed for the Execution, and by whom ?

ON the 18th, the House then sitting in the Chamber of Parliament, the Lord Chief Baron in the Absence of the Chief Justice of the Common Pleas, delivered in Writing the Opinion of the Judges, which they had agreed on and reduced into Form that Morning.

His Lordship added many weighty Reasons in Support of the Opinion, which he urged with great Strength and Propriety, and delivered with a becoming Dignity.

To the first Question.

"WE are all of Opinion, that a Peer indicted of Felony and Murder, and tried and convicted thereof before the Lords in Parliament, ought to receive Judgment for the same according to the Provisions of the Act of Parliament of the 25th Year of * his Majesty's * Geo. 2^d. Reign, intituled, *an Act for better preventing the horrid Crime of Murder.*"

To the second Question.

"SUPPOSING the Day appointed by the Judgment for Execution should lapse before such Execution done (which however the Law will not presume) we are all of Opinion, that a new Time may be appointed for the Execution either by the high Court of Parliament before which such Peer shall have been attainted, or by the Court
" of

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“ of King’s Bench, the Parliament not then sitting; the
 “ Record of the Attainder being properly removed into
 “ that Court.”

THE Reasons the Judges went upon in their Answer to the first Question are I presume too obvious to be mentioned at large. And the House resolved and ordered that Judgment shall be pronounced in *Westminster Hall* pursuant to the late Act.

THE Reasons upon which the Judges founded their Answer to the Second, relating to the further Proceedings of the House after the High Steward’s Commission dissolved, which is usually done upon pronouncing Judgment, may possibly require some further Discussion. I will therefore before I conclude, mention those which weighed with me, and I believe with many others of the Judges.

THE House before they adjourned to the Court Room in *Westminster Hall* for pronouncing Judgment, resolved and ordered that Execution be respited to the 5th Day of *May* following. Upon which Day Execution was done at *Tyburn* pursuant to the Judgment, and the Body delivered at *Surgeons-Hall* to be dissected and anatomized.

THE Writ to the Sheriffs for Execution was as followeth.

GEORGE the Second, by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith and so forth, To the Sheriffs of London and Sheriff of Middlesex Greeting: Whereas Lawrence Earl Ferrers Viscount Tamworth hath been indicted of Felony and Murder by him done and committed, which said Indictment hath been certified before us in our present Parliament; and the said Lawrence Earl Ferrers Viscount Tamworth hath been thereupon arraigned, and upon such Arraignment hath pleaded Not Guilty; and the said Lawrence Earl Ferrers Viscount Tamworth hath before us in our said Parliament been tried, and in due Form of Law convicted thereof; and whereas Judgment hath been given in our said Parliament, that the said Lawrence Earl Ferrers Viscount Tamworth shall be hanged by the Neck ’till he is Dead, and that his Body be dissected and anatomized, the Execution of which Judgment yet remaineth

to be done, we require, and by these Presents strictly command you, that upon Monday the 5th Day of May Instant, between the Hours of nine in the Morning and one in the Afternoon of the same Day, him the said Lawrence Earl Ferrers Viscount Tamworth without the Gate of our Tower of London (to you then and there to be delivered as by another Writ to the Lieutenant of our Tower of London, or to his Deputy directed, we have commanded) into your Custody you then and there receive, and him in your Custody so being, you forthwith convey to the accustomed Place of Execution at Tyburn, and that you do cause Execution to be done upon the said Lawrence Earl Ferrers Viscount Tamworth in your Custody so being, in all Things according to the said Judgment. And this you are by no Means to omit at your Peril. Witness ourself at Westminster the second Day of May, in the 33d Year of our Reign.

YORKE and YORKE.

Reasons, &c.

EVERY Proceeding in the House of Peers acting in it's judicial Capacity, whether upon Writ of Error, Impeachment, or Indictment removed thither by *Certiorari*, is in Judgment of Law a Proceeding before the *King in Parliament*. And therefore the House in all those Cases may not improperly be stiled, the Court of our Lord the King in Parliament.

THIS Court is founded upon immemorial Usage, upon the Law and Custom of Parliament, and is Part of the original System of our Constitution.

It is open for all the Purposes of Judicature during the Continuance of the Parliament: it openeth at the Beginning, and shutteth at the End of every Session; just as the Court of King's Bench, which is likewise in Judgment of Law held before the King himself, openeth and shutteth with the Term.

THE Authority of this Court, or, if I may use the Expression, it's constant Activity for the Ends of publick Justice independent of any special Powers derived from the Crown, is not doubted in the Case of Writs of Error from those Courts of Law whence Error lieth in Parliament, and of Impeachments for Misdemeanors.

IT

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IT was formerly doubted whether in the Case of an Impeachment for Treason, and in the Case of an Indictment against a Peer for any capital Crime removed into Parliament by *Certiorari*, whether in these Cases the Court can proceed to Trial and Judgment without an High Steward appointed by special Commission from the Crown.

THIS Doubt seemeth to have arisen from the not distinguishing between a Proceeding in the Court of the High Steward, and that before the King in Parliament. The Name, Stile, and Title of Office is the same in both Cases, but the Office, the Powers and Preheminences annexed to it differ very widely; and so doth the Constitution of the Courts where the Offices are executed. The Identity of the Name may have confounded our Ideas, as equivocal Words often do if the Nature of Things is not attended to; but the Nature of the Offices properly stated will I hope remove every Doubt on these Points.

IN the Court of the High Steward, he alone is Judge in all Points of Law and Practice; the Peers Triers are merely Judges of Fact, and are summoned by Virtue of a Precept from the High Steward to appear before him on the Day appointed by him for the Trial, *Ut Rei Veritas melius scire poterit*.

THE High Steward's Commission, after reciting that an Indictment hath been found against the Peer by the Grand Jury of the proper County, impowereth him to send for the Indictment, to convene the Prisoner before him at such Day and Place as he shall appoint; then and there to hear and determine the Matter of such Indictment; to cause the Peers Triers *tot & tales per quos Rei Veritas melius sciri poterit*, at the same Day and Place to appear before him: *Veritateque inde compertâ*, to proceed to Judgment according to the Law and Custom of *England*, and thereupon to award Execution. *

By this it is plain that the sole Right of Judicature is in Cases of this Kind vested in the High Steward; that it resideth solely in his Person, and consequently without this Commission, which is but in Nature of a Commission of *Oyer and Terminer*, no one Step can be taken in order to

* See Lord Clarendon's Commission as High Steward, and the Writs and Precepts preparatory to the Trial in Lord Morley's Case. 7. St. Tri.

a Trial. And that when his Commission is dissolved, which he declareth by breaking his Staff, the Court no longer existeth.

BUT in a Trial of a Peer in full Parliament, or, to speak with legal Precision, before the King in Parliament, for a capital Offence, whether upon Impeachment or Indictment, the Case is quite otherwise. Every Peer present at the Trial, and every Temporal Peer hath a Right to be present in every Part of the Proceeding, voteth upon every Question of Law and Fact; and the Question is carried by the major Vote; the High Steward himself voting meerly as a Peer and Member of that Court in common with the rest of the Peers, and in no other Right.

It hath indeed been usual, and very expedient it is in Point of Order and Regularity and for the Solemnity of the Proceeding, to appoint an Officer for presiding during the Time of the Trial and until Judgment, and to give him the Stile and Title of Steward of *England*. But this maketh no Sort of Alteration in the Constitution of the Court. It is the same Court founded in immemorial Usage, in the Law and Custom of Parliament, whether such Appointment be made or not.

It acteth in it's judicial Capacity in every Order made touching the Time and Place of the Trial, the postponing the Trial from Time to Time upon Petition according to the Nature and Circumstances of the Case, the Allowance or Non-Allowance of Council to the Prisoner, and other Matters relative to the * Trial; and all this before an High Steward hath been appointed. And so little was it apprehended in some Cases which I shall mention presently, that the Existence of the Court depended on the Appointment of an High Steward, that the Court itself directed in *what Manner and by what Form of Words he should be appointed*. It hath likewise received and recorded the Prisoner's Confession which amounteth to a Conviction, before the Appointment of an High Steward, and hath allowed to Prisoners the Benefit of Acts of general Pardon where they appeared intitled to it, as well without the Appointment of an High Steward, as after his Commission dissolved.

* See the Orders previous to the Trial in the Cases of the Lords *Kilmarnock*, &c. and Lord *Lowat* and many other modern Cases.

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AND when, in the Case of Impeachments, the Commons have sometimes at Conferences between the Houses attempted to interpose in Matters preparatory to the Trial, the general Answer hath been, "This is a Point of *Judicature* upon which the Lords will not confer, they impose Silence upon themselves," or to that Effect. I need not here cite Instances; every Man who hath consulted the Journals of either House hath met with many of them.

I will now cite a few Cases applicable, in my Opinion, to the present Question. And I shall confine myself to such as have happened since the Restoration. Because in Questions of this Kind, modern Cases settled with Deliberation and upon a View of former Precedents, give more Light and Satisfaction than the deepest Search into Antiquity can afford. And also because the Prerogatives of the Crown, the Privileges of Parliament, and the Rights of the Subject in general, appear to me to have been more studied and better understood at, and for some Years before that Period, than in former Ages.

Lords Journal.

IN the Case of the Earl *Danby* and the popish Lords then under Impeachments, the Lords on the 6th of May 1679 appointed Time and Place for hearing the Earl of *Danby* by his Council upon the Validity of his Plea of Pardon, and for the Trials of the other Lords; and voted an Address to his Majesty praying that he would be pleased to appoint an High Steward for those Purposes.

THESE Votes were on the next Day communicated to the Commons by Message in the usual Manner.

ON the 8th at a Conference between the Houses upon the Subject-matter of that Message, the Commons expressed themselves to the following Effect, "They cannot apprehend what should induce your Lordships to address his Majesty for an High Steward for determining the Validity of the Pardon which hath been pleaded by the Earl of *Danby*, as also for the Trial of the other five Lords, because they conceive the constituting an High Steward is not necessary, but that Judgment may be given in Parliament upon Impeachment without an High Steward." And concluded with a Proposition, that for avoiding any Interruption or Delay a Committee of both Houses might be

be nominated to consider of the most proper Ways and Methods of Proceeding.

THIS Proposition the House of Peers after a long Debate rejected.

Dissentientibus, Finch * Chancellor, and many other Lords.

HOWEVER on the 11th the Commons Proposition of the 8th was upon a second Debate agreed to, and the Lord Chancellor, Lord President, and ten other Lords were named of the Committee, to meet and confer with a Committee of the Commons.

THE next Day the Lord President reported that the Committees of both Houses met that Morning, and made an Entrance into the Business referred to them. That the Commons desired to see the Commissions that are prepared for an High Steward at these Trials, and also the Commissions in the Lord *Pembroke's*, and the Lord *Morley's* Cases.

THAT to this the Lords Committees said, "The High Steward is but Speaker *pro Tempore*, and giveth his Vote as well as the other Lords. This changeth not the Nature of the Court. And the Lords declared they have Power enough to proceed to Trial, though the King should not name an High Steward." †

"THAT this seemed to be a Satisfaction to the Commons provided it was entered in the Lords Journal which are Records."

ACCORDINGLY on the same Day, "it is declared and ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Office of an High Steward upon Trials of Peers upon Impeachments is not necessary to the House of Peers; but that the Lords may proceed in such Trials if an High Steward be not appointed according to their humble Desire." ‡

* Afterwards Earl of *Nottingham*.

† In the Commons Journal of the 15th of *May* it standeth thus, their Lordships further declared to the Committee, that a Lord High Steward was made *hac Vice* only. That notwithstanding the making of a Lord High Steward the Court remained the same and was not thereby altered, but still remained the Court of Peers in Parliament. That the Lord High Steward was but as a Speaker or Chairman, for the more orderly proceeding at the Trials.

‡ This Resolution my Lord Chief Baron referred to and cited in his Argument upon the second Question proposed to the Judges, which is before stated.

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ON the 13th the Lord President reported that the Committees of both Houses had met that Morning and discoursed in the first Place on the Matter of a Lord High Steward, and had perused former Commissions for the Office of High Steward. And then putting the House in mind of the Order and Resolution of the preceding Day, proposed from the Committees, that a new Commission might issue so as the Words in the Commission may be thus changed, *viz.* instead of, *Ac pro eo quòd Officium Seneschalli Angliæ (cujus præsentia in hac parte requiritur) ut accepimus jam vacat,* may be inserted, *Ac pro eo quòd Proceres & Magnates in Parlamento nostro Assemblati Nobis humiliter supplicaverunt ut Seneschallum Angliæ pro hac Vice constituere dignaremur,* to which the House agreed. *

It must be admitted that Precedents drawn from Times of Ferment and Jealousy, as these were, lose much of their Weight; since Passion and Party-Prejudice generally mingle in the Contest. Yet let it be remembered that these are Resolutions in which both Houses concurred, and in which the Rights of both were thought to be very nearly concerned; the Commons Right of impeaching with Effect, and the whole Judicature of the Lords in capital Cases. For if the Appointment of an High Steward was admitted to be of absolute Necessity (however necessary it may be for the Regularity and Solemnity of the Proceeding during the Trial and until Judgment, which I do not dispute) every Impeachment may, for a Reason too obvious to be mentioned, be rendered ineffectual. And the Judicature of the Lords in all capital Cases, nugatory.

It was from a Jealousy of this Kind, not at that Juncture altogether groundless, and to guard against every Thing from whence the Necessity of an High Steward in the Case of an Impeachment might be inferred, that the Commons proposed and the Lords readily agreed to the Amendment in the Steward's Commission which I have already stated. And it hath, I confess, great weight with

* This Amendment arose from an Exception taken to the Commission by the Committee for the Commons, which as it then stood did in their Opinion imply that the constituting a Lord High Steward was necessary. Whereupon it was agreed by the whole Committee of Lords and Commons, that the Commission should be recalled, and a new Commission according to the said Amendment issue to bear Date after the Order and Resolution of the 12th. (Commons Journal of the 15th of May.)

me,

me, that this Amendment which was at the same Time directed in the Cases of the five popish Lords when Commissions should pass for their Trials, have taken Place in every Commission upon Impeachments for Treason since that Time. * And I cannot help remarking that in the Case of Lord *Lovat*, when neither the Heat of the Times, nor the Jealousy of Parties had any Share in the Proceeding, the House ordered, "That the Commission for appointing a Lord High Steward shall be in the like Form as that for the Trial of the Lord Viscount *Stafford* as entered in the Journal of this House on the 30th of *November* 1680, except that the same shall be in the *English* Language." †

I will make a short Observation on this Matter.

THE Order on the 13th of *May* 1679 for varying the Form of the Commission was, as appeareth by the Journal, plainly made in Consequence of the Resolution of the 12th, and was founded on it; and consequently the constant unvarying Practice with regard to the new Form, goeth in my Opinion a great Way towards shewing that in the Sense of all succeeding Times that Resolution was not the Result of Faction or a blameable Jealousy, but was founded in sound Reason and true Policy.

It may be objected that the Resolution of the 12th of *May* 1679 goeth no further than to a Proceeding upon Impeachment.

THE Letter of the Resolution, it is admitted, goeth no further, but this is easily accounted for. A Proceeding by Impeachment was the Subject-matter of the Conference, and the Commons had no Pretence to interpose in any other. But what say the Lords? *The High Steward is but as a Speaker or Chairman PRO TEMPORE for the more orderly Proceeding at the Trials; the Appointment of him doth not alter the Nature of the Court, which still remaineth the Court of the Peers in Parliament.* From these Premises they draw the Conclusion I have mentioned. Are not these Premises equally true in the Case of a Proceeding upon Indictment? They undoubtedly are.

* See in the State Trials the Commissions in the Cases of the Earl of *Oxford*, Earl of *Derwentwater* and others, Lord *Winton*, and Lord *Lovat*.

† See the Proceedings printed by Order of the House of Lords. (4^o Feb. 1746.)

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It must likewise be admitted that in the Proceeding upon Indictment, the High Steward's Commission hath never varied from the antient Form in such Cases; the Words objected to by the Commons, *Ac pro eo quòd Officium Seneschalli Angliæ (cujus præsentia in hac parte requiritur) ut accepimus jam vacat*, are still retained. But this proveth no more than that the Great Seal having no Authority to vary in Point of Form, hath from Time to Time very prudently followed antient Precedents.

I have already stated the Substance of the Commission in a Proceeding in the Court of the High Steward. I will now state the Substance of that in a Proceeding in the Court of the Peers in Parliament. And shall make use of that in the Case of the Earl of *Kilmarnock* and others, as being the latest and in Point of Form agreeing with the former Precedents.

THE Commission, after reciting that *William* Earl of *Kilmarnock* &c. stand indicted before Commissioners of Gaol Delivery in the County of *Surry* for High Treason in levying War against the King; and that the King intendeth that the said *William* Earl of *Kilmarnock* &c. shall be heard, examined, sentenced, and adjudged before himself in this present Parliament touching the said Treason; and for that the Office of Steward of *Great Britain* (whose Presence is required upon this Occasion) is now vacant as we are informed, appointeth the then Lord Chancellor Steward of *Great Britain* to bear, execute, and exercise (for this Time) the said Office with all Things due and belonging to the same Office in that behalf.

WHAT therefore are the Things due and belonging to the Office in a Case of this Kind? Not, as in the Court of the High Steward, a Right of Judicature. For the Commission itself supposeth that Right to reside in a Court then subsisting before the King in Parliament. The Parties are to be there heard, sentenced, and adjudged. What Share in the Proceeding doth the High Steward then take? By the Practice and Usage of the Court of the Peers in Parliament he giveth his Vote as a Member thereof with the rest of the Peers; but for the Sake of Regularity and Order he presideth during the Trial and until Judgment as Chairman, or Speaker *pro Tempore*. In that Respect therefore it may

may be properly enough said that his Presence is required during the Trial and until Judgment, *and in no other*. Herein I see no Difference between the Case of an Impeachment and of an Indictment.

I say during the Time of the Trial and until Judgment, because the Court hath as I observed before, from Time to Time done various Acts plainly judicial before the Appointment of an High Steward, and where no High Steward hath ever been appointed, and even after the Commission dissolved.

I will to this Purpose cite a few Cases.

I begin with the latest, because they are the latest, and were ruled with great Deliberation, and for the most Part upon a View of former Precedents.

In the Case of the Earl of *Kilmarnock* and others, the Vid. Pro-
Lords on the 24th of *June* 1746, ordered that a Writ or ceedings in
Writs of *Certiorari* be issued for removing the Indictments Print.

before the House. And on the 26th the Writ, *which is made returnable before the King in Parliament*, with the Return and Indictments was received and read. On the next Day upon the Report of the Lords Committees, that they had been attended by the two Chief Justices and Chief Baron and had heard them touching the Construction of the Act of the 7th and 8th of King *William*, "for regulating Trials in Cases of High Treason and "Misprision of Treason," the House upon reading the Report came to several Resolutions founded for the most Part on the Construction of that Act. What that Construction was appeareth from the Lord High Steward's Address to the Prisoners just before their Arraignment. Having mentioned that Act as one happy Consequence of the Revolution he addeth, "however injuriously that Revolution hath been traduced, whatever Attempts have "been made to subvert this happy Establishment founded "on it, your Lordships will now have the Benefit of that "Law in it's full Extent."

Printed Trial
p. 11

I need not after this mention any other judicial Acts done by the House in this Case before the Appointment of the High Steward, many there are. For the putting a Construction upon an Act relative to the Conduct of the Court, and the Right of the Subject at the Trial and in

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the Proceedings preparatory to it; and this in a Case entirely new, and upon a Point, to say no more in this Place, not extreamly clear, was undoubtedly an Exercise of Authority proper only for a Court having full Cognizance of the Cause.

I will not minutely enumerate the several Orders made preparatory to the Trial of Lord *Lovel*, and in the several Cases I shall have Occasion to mention, touching the Time and Place of the Trial, the Allowance or Non-allowance of Council, and other Matters of the like Kind, all plainly judicial, because the like Orders occur in all the Cases where a Journal of the preparatory Steps hath been published by order of the Peers. With regard to Lord *Lovel*'s Case, I think the Order directing the Form of the High Steward's Commission, which I have already taken Notice of, is not very consistent with the Idea of a Court whose Powers can be supposed to depend at any Point of Time upon the Existence or Dissolution of that Commission.

IN the Case of the Earl of *Derwentwater* and the other Lords impeached at the same Time, the House received and recorded the Confessions of those of them who pleaded Guilty long before the *Teste* of the High Steward's Commission; which issued meerly for the Solemnity of giving Judgment against them upon their Conviction.

See the Proceedings in Print.

THIS appeareth by the Commission itself, it reciteth that the Earl of *Derwentwater* and others *Coram Nobis in præsentì Parlamento* had been impeached by the Commons for High Treason, and had *coram Nobis in præsentì Parlamento* pleaded Guilty to that Impeachment, and that the King intending that the said Earl of *Derwentwater* and others *de & pro Proditione unde ipsi ut præfertur Impetit' Accusat' & Convict' existunt coram Nobis in præsentì Parlamento secundum Legem & Consuetudinem hujus Regni Nostri Magnæ Britannæ, Audientur, Sententientur, & Adjudicentur*, constituteth the then Lord Chancellor High Steward (*hac vice*) to do and execute all Things which to the Office of High Steward in that behalf do belong.

THE receiving and recording the Confession of the Prisoners, which amounted to a Conviction so that nothing remained but proceeding to Judgment, was certainly an Exercise of judicial Authority, which no Assembly how
great

great foever not having full Cognizance of the Cause could exercise.

IN the case of Lord *Salisbury*, who had been impeach- See the Jour-
ed by the Commons for High Treason, the Lords upon nals of the
his Petition allowed him the Benefit of the Act of general Lords.
Pardon passed in the second Year of *William and Mary*,
so far as to discharge him from his Imprisonment, upon
a Construction they put upon that Act, *no High Steward*
ever having been appointed in that Case.

ON the 2d. Oct. 1690, upon reading the Earl's Petiti-
on setting forth that he had been a Prisoner for a Year and
nine Months in the Tower notwithstanding the late Act
of free and general Pardon, and praying to be discharged;
the Lords ordered the Judges to attend on the *Monday*
following to give their Opinions, whether the said Earl
be pardoned by the Act. On the 6th. the Judges deliver-
ed their Opinions, that if his Offence was committed be-
fore the 13th of *Feb.* 1688, and not in *Ireland* or beyond
the Seas, he is pardoned. Whereupon it was ordered
that he be admitted to Bail; and the next Day he and
Sureties entered into a Recognizance of Bail, himself
in £ 10000, and two Sureties in £ 5000 each; and on
the 30th he and his Sureties were, after a long Debate,
discharged from their Recognizance.

It will not be material to inquire, whether the House
did right in discharging the Earl without giving the Com-
mons an opportunity of being heard. Since in fact, they
claimed and exercised a right of Judicature without an
High Steward which is the only Use I make of this Case.

THEY did the same in the Case of the Earl of *Carn-
warth*, the Lords *Widdrington* and *Nairn*, long after the
High Steward's Commission dissolved.

THESE Lords had Judgment passed on them at the
same time that Judgment was given against the Lords
Derwentwater, *Nithsdale*, and *Kenmure*; and Judgment
being given, the High Steward immediately broke his
Staff, and declared the Commission dissolved. They
continued Prisoners in the Tower under Reprieves 'till
the passing the Act of general Pardon in the 3d of King
GEORGE the First.

Lords Journal.

3. Geo. 1.
c. 19.

ON the 21st of *November* 1717, the House being informed that these Lords had severally entered into Recognizances before one of the Judges of the Court of King's Bench for their Appearance in the House in this Session of Parliament, and that the Lords *Carnwarth* and *Widdrington* were attending accordingly, and that the Lord *Nairn* was ill at *Bath* and could not then attend, the Lords *Carnwarth* and *Widdrington* were called in; and severally at the Bar prayed that their Appearance might be recorded, and likewise prayed the Benefit of the Act for his Majesty's general and free Pardon.

WHEREUPON the House ordered that their Appearance be recorded; and that they attend again to-morrow in order to plead the Pardon. And the Recognizance of the Lord *Nairn* was respited 'till that Day Fortnight.

ON the morrow the Lords *Carnwarth* and *Widdrington* then attending were called in, and the Lord Chancellor acquainted them severally that it appeared by the Records of the House that they severally stood attainted of High Treason, and asked them severally what they had to say why they should not be remanded to the *Tower of London*.

THEREUPON they severally upon their Knees prayed the Benefit of the Act, and that they might have their Lives and Liberty pursuant thereunto.

AND the Attorney General, who then attended for that purpose, declaring that he had no objection on his Majesty's behalf to what was prayed, conceiving that those Lords not having made any Escape since their Conviction were intitled to the Benefit of the Act, the House, after reading the Clause in the Act relating to that Matter, agreed that they should be allowed the Benefit of the Pardon as to their Lives and Liberties, and discharged their Recognizances; and gave them leave to depart without further Day given for their Appearance.

ON the 6th of *December* following the like Proceedings were had, and the like Orders made in the Case of Lord *Nairn*.

I observe that the Lord Chancellor did not ask these Lords, what they had to say, *why Execution should not be awarded*. There was it is probable some little Delicacy as to that Point. But since the Allowance of the Benefit

See Sect. 45.
of the 3^d
Geo. 1.

fit of the Act as to Life and Liberty, which was all that was prayed, was an effectual Bar to any future Imprisonment on that account, and also to Execution, and might have been pleaded as such in any Court whatsoever; the whole Proceeding must be admitted to have been in a Court having compleat Jurisdiction in the Case, notwithstanding the High Steward's Commission had been long dissolved. Which is all the Use I intended to make of this Case.

I will not recapitulate; the Cases I have cited, and the Conclusions drawn from them are brought into a very narrow Compass. I will only add, that it would sound extremely harsh to say, that a Court of criminal Jurisdiction founded in immemorial Usage, and held in Judgment of Law before the *King himself*, can in any Event whatever be under an utter Incapacity of proceeding to Trial and Judgment either of Condemnation or Acquittal, the ultimate Objects of every criminal Proceeding, without certain supplemental Powers derived from the Crown.

THESE Cases, with the Observations I have made on them, I hope, sufficiently warrant the Opinion of the Judges upon that Part of the second Question in the Case of the late Earl *Ferrers* which I have already mentioned. And also what was advanced by the Lord Chief Baron in his Argument on that Question, "That though the Office of High Steward should happen to determine before Execution done according to the Judgment, yet the Court of the Peers in Parliament, where that Judgment was given, would subsist for all the Purposes of Justice during the sitting of the Parliament." And consequently that in the Case supposed by the Question, that Court might appoint a new Day for the Execution.

N. B. ON the 19th of May 1760, *Washington* Earl *Ferrers*, next Brother to the late Earl, having received his Writ of Summons, took his Seat in Parliament as Earl *Ferrers*.

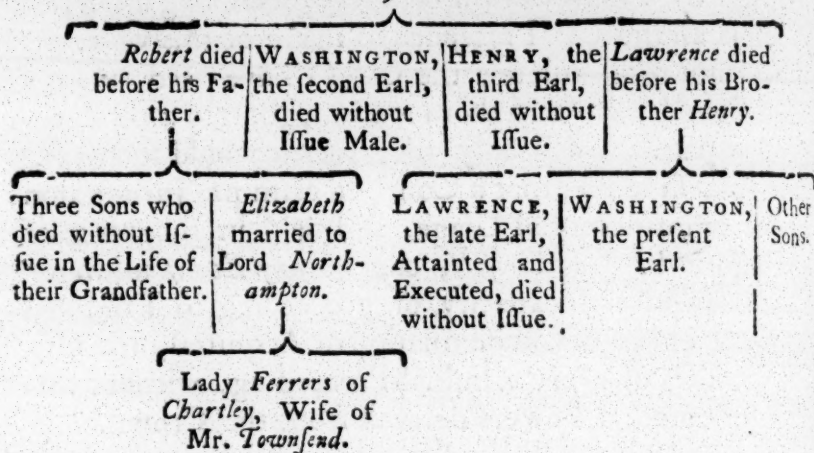
THE Family Pedigree as far as concerneth the present Case is as followeth.

ROBERT the first Earl, who in the 29th of *Charles 2d*, was summoned to Parliament by the Title of Lord *Ferrers of Chartley*, being Grandson and Heir to *Dorothy* Sister and

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and Coheir to *Robert D'Evereux* Earl of *Essex* the Parliament General, was in the 10th, of *Queen Anne* created Viscount *Tamworth* and Earl *Ferrers*, to him and the Heirs Male of his Body.

ROBERT, the first Earl.



The Case of ALEXANDER BROADFOOT.

ADVERTISEMENT.

THIS Case though already in Print, hath been thought to deserve a Place in this Collection, It is therefore here inserted.

If it be asked, where are the adjudged Cases on which the Author groundeth his Opinion? He freely confesseth, that he hath not met with one, in which the Legality of pressing for the Sea Service hath directly come in Judgment. What this is to be imputed to every Reader will judge. A few modern Cases there are, from which the Legality of the Practice may be inferred. But the Author chose to ground himself on much better Authorities than Inferences from modern Reports.

AT the Gaol Delivery held for the City and County of the City of *Bristol*, August 30th, 1743, *Alexander Broadfoot* was indicted for the Murder of *Cornelius Calahan* a Sailor belonging to His Majesty's Ship the *Mortar Sloop*.

THE Case was thus, Captain *Hanway*, Commander of the *Mortar Sloop*, had a Warrant from the Lords of the Admiralty,

Admiralty, grounded on an Order of his Majesty in Council, empowering him to impress, or cause to be impressed, Seamen for his Majesty's Service. The Warrant expressly directeth, "that the Captain shall not intrust any Person with the execution of it, but a Commission Officer; and shall insert the Name and Office of the Person intrusted on the back of the Warrant."

THE Lieutenant of the *Mortar Sloop*, (the only Commission Officer on board besides the Captain) was deputed by him to impress according to the Tenor of the Warrant.

ON the 25th of April last, Captain *Hanway* being at Anchor in *Kingroad* within the Port and County of *Bristol*, ordered the Ship's Boat down the Channel in order to press as they should see Opportunity. But the Lieutenant staid in *Kingroad*, on board with the Captain.

TOWARDS Evening, the Boat came up with a Merchant Man, the *Bremen Factor* homeward-bound, in that part of the Channel which is within the County of the City of *Bristol* but some Leagues from *Kingroad*; and some of the Crew went on board, in order to press: who being informed that one or two of the *Bremen's* Men were concealed in the Hold, *Calaban* with three others of the Boat's Crew, went thither in search of them. Whereupon *Broadfoot*, one of the *Bremen's* Men, (who had before provided himself with a Blunderbuss and Pistols for his Defence against the Press Gang) called out and asked them what they came for: He was answered by some of the Press Gang, "we come for you and your Comrades." Whereupon he cried out, "keep back, I have a Blunderbuss loaded with Swan Shot." Upon this the others stopped, but did not retire. He then cried out, "where is your Lieutenant?" and being answered, "he is not far off," immediately fired among them. By this shot *Calaban* was killed on the spot, and one or two more of the Press Gang wounded.

THE Case being thus, the Recorder was of Opinion, Mr. Serjeant Foster. that the Boat's Crew having been sent out with a general Order to impress as they should see Opportunity, and having in Pursuance of that Order, boarded the Vessel without a proper Officer, expressly against the Terms of the Captain's Warrant, every Thing they did was to be looked upon as an Attempt upon the Liberty of the Persons concerned, without

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without any legal Warrant: and he accordingly directed the Jury to find *Broadfoot* guilty of Manslaughter. But this being a Case of great Expectation, and uncommon Pains having been taken to possess People with an Opinion that pressing for the Sea-Service is a Violation of *Magna Charta*, and a very high Invasion of the Liberty of the Subject, the Recorder thought proper to deliver his Opinion touching the Legality of pressing for the Sea Service, provided the Persons impressed are proper Objects of the Law, and those employed in that Service come armed with a proper Warrant for that purpose.

Captain *Hanway's* Warrant with the Indorsement.

By the Commissioners for executing the Office of Lord High Admiral of *Great Britain and Ireland, &c.* and of all his Majesty's Plantations, &c.

IN Pursuance of his Majesty's Order in Council dated the 19th Day of January 1742, We do hereby empower and direct you to impress or cause to be impressed so many Seamen and Seafaring Men and Persons whose Occupations and Callings are to work in Vessels and Boats upon Rivers, as shall be necessary not only to compleat the Number of Men allowed to his Majesty's Ship under your Command, but also to Man such others of his Majesty's Ships as may be in Want of Men; giving unto each Man so impressed one Shilling for Press Money. And in the Execution hereof you are to take care that neither yourself nor any Officer authorized by you do demand or receive any Money, Gratuity, Reward, or other Consideration whatsoever, for the sparing, exchanging, or discharging any Person or Persons impressed, or to be impressed, as you will answer it at your Peril. You are not to intrust any Person with the Execution of this Warrant but a Commission Officer, and to insert his Name and Office in the Deputation on the other Side hereof, and set your Hand and Seal thereto. This Warrant to continue in Force 'till the 31st Day of December 1743. And in the due Execution of the same and every Part thereof, all Mayors, Sheriffs, Justices of the Peace, Bailiffs, Constables, Headboroughs, and all other his Majesty's Officers and Subjects whom it may concern, are hereby required to be aiding and assisting unto you and those employed by you, as
they

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they tender his Majesty's Service, and will answer the contrary at their Perils. Given under our Hands and the Seal of the Office of Admiralty the 31st Day of January 1742.

By Command of their
Lordships.
Thomas Corbett.

Jo. Cokburne.
Geo. Lee.
J. Trevor.

I do hereby depute A. B. a Lieutenant belonging to his Majesty's Ship the Mortar Sloop under my Command, to impress Seamen, Seafaring Men, and Persons whose Occupations and Callings are to work in Vessels and Boats upon Rivers according to the Tenor of this Warrant. In Testimony whereof I have hereunto set my Hand and Seal this day of

The RECORDER's Argument.

THIS Question touching the Legality of pressing Mariners for the publick Service is a Point of very great and national Importance. On one Hand, a very useful Body of Men seem to be put under Hardships inconsistent with the Temper and Genius of a free Government. On the other, the Necessity of the Case seemeth to intitle the publick to the Service of this Body of Men, whenever the Safety of the Whole calleth for it.

BEFORE I speak directly to the Point, it will be necessary to throw out of the Case every Thing which doth not enter into the Merits of the present Question.

WE are not at present concerned to enquire, whether Persons may be legally pressed into the Land-Service, nor whether Landmen may be legally pressed into the Sea-Service. The present Question I say, is not whether People may be taken from their lawful Occupations at Home, and sent against their Wills into a remote and dangerous Service; into a Service they are utterly unacquainted with, and possibly unfit for. No, the only Question at present is, whether Mariners, Persons who have freely chosen a Seafaring Life, Persons whose Education and Employment have fitted them for the Service, and inured them to it, whether such Persons may not be legally pressed into the Service of

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of the Crown, whenever the publick Safety requireth it, *Ne quid detrimenti Respublica capiat.*

FOR my Part I think they may. I think the Crown hath a Right to command the Service of these People, whenever the publick Safety calleth for it. The same right that it hath to require the * personal Service of every Man able to bear Arms in Case of a sudden Invasion or formidable Insurrection. The Right in both Cases is founded on one and the same Principle, the Necessity of the Case in order to the Preservation of the Whole.

It would be Time very ill spent to go about to prove that this Nation can never be long in a State of Safety, our Coast defended and our Trade protected, without a naval Force equal to all the Emergencies that may happen. And how can we be secure of such a Force? The keeping up the same naval Force in Time of Peace, which will be absolutely necessary for our Security in Time of War, would be an absurd, a fruitless, and a ruinous Expence.

THE only Course then left, is for the Crown to employ upon emergent Occasions the Mariners bred up in the Merchants Service.

By this means the Trade of the Nation becometh a Nursery for her Navy; and the Merchant, while he is increasing the Wealth of the Kingdom, is at the same time training up the Mariner for its Defence.

AND as for the Mariner himself, he when taken into the Service of the Crown only changeth Masters for a Time: His Service and Employment continue the very same, with this Advantage, that the Dangers of the Sea and Enemy are not so great in the Service of the Crown, as in that of the Merchant.

I am very sensible of the Hardship the Sailor suffereth from an Impress in some particular Cases, especially if pressed Homeward-bound after a long Voyage. But the Merchants who hear me know, that an Impress on Outward-bound Vessels would be attended with much greater Inconveniencies to the Trade of the Kingdom; and yet that too is sometimes necessary. But where two Evils present, a wise

* This personal Service in cases of extreme Necessity is a principal Branch of the Allegiance every Subject of England oweth to the Crown. See 11 H. 7. c. 1, and 1 E. 3. c. 5. 16 17. Car. 1. c. 28.

Administration, if there be room for an Option, will choose the least.

WAR itself is a great Evil, but it is chosen to avoid a greater. The Practice of pressing is one of the Mischiefs War bringeth with it. But it is a Maxim in Law, and good Policy too, that all private Mischiefs must be borne with Patience for preventing a national Calamity. And as no greater Calamity can befall us than to be weak and defenceless at Sea in a Time of War, so I do not know that the Wisdom of the Nation hath hitherto found out any Method of manning our Navy, less inconvenient than pressing; and at the same time, equally sure and effectual.

THE Expedient of a voluntary Register which was attempted in King *William's* Time, had no Effect.

AND some late Schemes I have seen appear to me more inconvenient to the Mariner and more inconsistent with the Principles of Liberty, than the Practice of pressing: and, what is still worse, they are in my Opinion totally impracticable.

THUS much I thought proper to say upon the Foot of Reason and publick Utility, before I come to speak directly to the Point of Law. Which I shall now do.

ACCORDING to my present Apprehension, (and I have taken some Pains to inform myself) the Right of impressing Mariners for the publick Service is a Prerogative inherent in the Crown, *grounded upon Common-Law, and recognized by many Acts of Parliament.*

A general immemorial Usage not inconsistent with any Statute, especially if it be the Result of evident Necessity and withal tendeth to the publick Safety, is, I apprehend, Part of the Common-Law of *England*. If not, I am at a Loss to know what is meant by Common-Law, in Contradistinction to Statute-Law. And therefore it is a great Mistake in this Case, as indeed it would be in any other, to conclude that there is no Law, because perhaps there may be no Statute that expressly and in Terms empowereth the Crown to press. For the Rights of the Crown, and the Liberties of the Subject too, stand principally upon the Foot of Common-Law; though both have been in many Cases confirmed, explained, or ascertained by particular Statutes.

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As to the Point of Usage in the Matter of pressing, I have met with a Multitude of Commissions and mandatory Writs to that Purpose conceived in various Forms; and from Time to Time directed to different Officers, as the Nature of the Service required.

It would be tedious for me to cite one half of them; but I will endeavour to range them under some general Heads, and then cite a few.

Some are for pressing Ships.

Others for pressing Mariners.

And others for pressing Ships and Mariners.

IN some, the Parties to whom they are directed are required to make a general Impress upon certain great and emergent Occasions.

IN others, they are confined to a certain Number of Ships and Mariners for special Services.

AND in others, they are still further confined to certain Places on the Coast.

SOME Commissions, particularly those conferring the Admiralty Jurisdiction and the Rights of Admiralty, warrant an Impress as often as there shall be Occasion.

OTHERS empower Commanders of Fleets or Squadrons intended for certain Expeditions, to press for that particular Service.

AND others empower Masters of particular Ships to press for manning their respective Vessels.

THIS general View will be sufficient to let us into the Nature of these Precedents. And though the Affair of pressing Ships is not now before me, yet I could not well avoid mentioning it; because many of the Precedents I have met with and must cite, go as well to that, as to the Business of pressing Mariners. And taken together, they serve to shew the Power the Crown hath constantly exercised over the whole naval Force of the Kingdom, as well Shipping as Mariners, whenever the publick Service required it.

THIS however must be observed, that no Man served the Crown in either Case at his own Expence. Masters and Mariners received full Wages, and Owners were constantly paid a full Freight. But whether the Pay in either Case commenced

commenced from the Time of pressing, or from the Time of actual Entry into the Service, is not so clear.

THERE is in *Cotton's* * Records a Note of a Petition of the Commons, and the King's Answer upon this Subject, in the 47 E. 3. which inclineth me to think the latter was the Case. The Petition as abridged by *Cotton* is thus.

" That Masters of Ships may be paid the Wages of them
 " and their Mariners from the Day of their being ap-
 " pointed to serve the King." The answer is, " That
 " taking of Ships shall not be but for Necessity, and Pay-
 " ment shall be reasonable as *Heretofore*." Cott. 118.
Nº 28.
Rot. Parl.
47 E. 3. Nº
28.

IN the same Parliament an Attempt was made to obtain for Owners of Ships an Allowance for Wear and Tear in the King's Service.

THE Petition is thus abridged, " The Masters of
 " Ships require an Allowance for the Tackling of their
 " Ships worn by the King's Service." Eod. Rot.
Nº 29. Cott.
118. Nº. 29.

THE Answer is, " Such Allowance hath *not been here-
 tofore made*."

IN the 2 R. 2. an Attempt of the like Kind was made
 and with the like Success. The Petition is, " That
 " Owners of Ships taken up for the King's Service, for
 " their Losses in the same may be considered; and that
 " Mariners may have the like Wages, as Archers have." Cott. 172.
Nº 50. Rot.
Parl. 2 R. 2.
Pars secunda.
Nº 50.
 The Answer is, " *It shall be as hath been used*."

THESE Petitions, though stiled in the Record the Petitions of the Commons as having probably begun in that House, were really the Acts of both Houses; otherwise they could not have been offered to the King in a Parliamentary Way. For the antient Method of passing Bills was, that the Matter of the Bill was tendered to the Crown for the Royal Assent by both Houses in Form of Petitions. And according to the Answers from the Throne they passed into Laws or were rejected.

I cannot but observe, that when we see every Branch of the Legislature speaking of the Subject of pressing in the Manner they do in these Petitions and Answers, it is not easy to conceive that the Legality of the Practice was then questioned. 'Tis plain at least, that it was in those early

* The Citations from *Cotton* have been found to agree with the Record.

Times treated in Parliament as an antient and well-known Usage.

I come now to the Commissions and mandatory Writs I spoke of. I will cite a few from *Rymer's Fœdera*, out of a great Number of the like Kind which may be met with in that valuable Collection of publick Records.

29. E. 3.

Ad Eligendum & Capiendum. WILLIAM *Barret* Commander of the Ship *Julian* had a Commission to make Choice of and take up in the Counties of * *Kent, Essex, Surry, and Suffex*, as well within Liberties as without, 36 Mariners, and to put them on board his Ship, in order to proceed with the Prince of *Wales* on an Expedition to *Gascony*.

THE like Commissions were given at the same time to the Commanders of seven other Ships for manning their respective Vessels for the same Service.

1 R. 2.

Ad Arrestandum & Capiendum.

THERE is a Commission to *John Orewell* one of the King's Serjeants at Arms to arrest and take up 60 able Mariners in the *Tbames* and *Medway* and Parts adjacent, as well within Liberties as without, and to cause them to be at *Sandwich* within 15 Days for the King's Service.

15 R. 2.

JOHN *Elingham* a Serjeant at Arms is impowered to arrest and take up in the Counties of *Somerset, Bristol, Devon* and *Cornwal*, and in *South Wales*, as well within Liberties as without, so many Ships, Barges, and other Vessels, and also Mariners sufficient for manning them, as should be found sufficient for an Expedition to *Ireland* under the King's Uncle the Duke of *Gloucester*. And all Sheriffs, Mayors, Bailiffs, Masters of Ships and Mariners are required to be assisting to him in that Service.

IN the same Year the like Commissions issued to two other Serjeants at Arms for the same Service, in *Wales, Ireland, Lancashire, and Cheshire*.

3. H. 5.

JOHN *Kingston* Commander of the Ship *Katharine* is commissioned by himself or Deputies to arrest and take up, as well within Liberties as without, as many Mariners as should be necessary for Manning his Ship, and to put them on board for the King's Service. And all Sheriffs, Mayors, &c. are required to be assisting to him in that Service.

* See *Madox Hist. of the Exchequer* 262. in *Notis, y. 2* Writ to the Sheriff of *Kent* for the like Service. *Eligi facias, 50 Nautas, &c. 9º E. 2.*

COMMISSIONS went at the same time to six Commanders of other Vessels for manning their respective Vessels in the same Manner; and for the same Service.

A Mandatory Writ issued directed to *Thomas Colledge* Serjeant at Arms, and to *Ralph Ingelsby*, and to the Customers of the Port of *Sandwich*, and of every Port from thence to *Southampton*, requiring them to arrest and take up for the King's Service all and singular Ships, Barges, and other Vessels capable of transporting Men or Horses, of what Burden soever; and also all Masters and Mariners that could be found in any of the Ports mentioned before, and to put the said Masters and Mariners on board the said Vessels for an Expedition to the Dutchy of *Aquitain*; Any Royal Letters of Licence thencefore granted to any Person or Persons or any other Matter notwithstanding: And all Sheriffs, Mayors, and other Officers are required to be assisting to them in that Service.

21. H. 6.

At the same time the like Writs issued to the Customers and other Officers of almost all the Port-Towns in the Kingdom.

THERE is a Commission to the Master and Purser of the *Mary Grace* impowering them to arrest and take up, as well within Liberties as without wheresoever they could be found, as many Mariners as should be sufficient for Manning their Vessel, and to put them on board at the King's Wages and for his Service.

14 E. 4.

At the same time the like Commissions issued to four other Masters for Manning their respective Ships in the same manner.

The like Commissions to Masters of Six Vessels.

15 E. 4.

The like to Eleven Masters in the same Form.

20 E. 4.

I will now mention a few Precedents of another Sort; which, because they relate in great Measure to one and the same Service, I will place together, to avoid as much as possible a needless Repetition in Matters of Form.

THESE are either special Commissions for commanding Fleets or Squadrons intended for certain Expeditions mentioned in the Commissions; or the general Commissions conferring the whole Admiralty Jurisdiction with the Rights of Admiralty, whether to one Person under the Stile of High Admiral or to two under the Character of

Admirals of the North and West. Which latter was the usual Manner of conferring the Admiralty Jurisdiction before the Office of Lord High Admiral of *England* came much in Use.

8 H. 5. *Eligendi & Capiendi.* As to the special Commissions, Sir *William Bardolph* was appointed Admiral of a Fleet then intended to be fitted out; his Commission impowereth him among other Things to make Choice of and take up for the King's Service a sufficient Number of Mariners and others, and to put them on board the Fleet, and to punish and chastise such Mariners who should be disobedient or refractory *in that respect*.

5 H. 7. THE Lord *Willoughby de Broke* was appointed Commander in Chief of the Fleet and Army then intended for an Expedition to *France*; he hath the same Powers with regard to the Manning the Fleet as Sir *William Bardolph* had.

8 H. 7. SIR *Robert Poyntz* is appointed to command the Fleet in the Absence of the Lord *Willoughby*, and hath the same Powers with regard to the Manning the Fleet.

31 Eliz. SIR *Martin Probisber* had a Commission, which after reciting that the Command of a small Squadron intended against the *Spaniards* in the *West Indies* had been given to him, goeth on thus, "We therefore let you to wit that
" we have authorized and appointed, and do by these
" Presents give full Power and Authority to the said Sir
" *Martin Probisber*, or to his sufficient Deputy or De-
" puties wheresoever he shall have Need, to press and
" take up for our Service to the Furniture of such Ships
" as shall be committed to his Charge in any Place upon
" our Coasts of *England* or *Ireland*, any Mariners, Sol-
" diers, Gunners, or other needful Artificers." And then requireth all Justices and other Officers to be assisting to him in the Premises.

I would not be understood to say, that all Commanders of Fleets or Squadrons for special Services have had the same Powers as those I have mentioned. The Truth is, the greater Number of these special Commissions, which I have met with, and those too of the latest Date, are silent as to that Point.

I come

I come now to the general Commissions conferring the whole Admiralty Jurisdiction and the Rights of Admiralty.

AND those I have met with, though I apprehend they all agree in Substance with regard to the present Question, yet differ a little in Point of Form.

IN the 10th E. 3. and in the 12th of the same Reign, the Admirals (for at that Time there were two, one for the North, the other for the West) are impowered to make Choice of, as well within Liberties as without, able-bodied Men fit for the Service, and to put them on board the Fleet. The Word *Eligendi* made use of in these Commissions, is the Word used to the same Purpose about that time in all the Commissions for pressing for the Land-Service, which was then likewise practised. You have the Word in relation to the Land-Service in the Statute of the 18 E. 3. "Men at Arms, Hoblers and "Archers *Chosen* to go into the King's Service out of the "Realm, shall be at the King's Wages from the Day "they depart out of the Counties where they were *Chosen* 'till their Return."

10 E. 3.

12 E. 3.

Eligendi.

IN the 50th E. 3. the Admirals Commissions with regard to this matter run thus, *Nec non Naves & Naviculas Guerinas, quot necessariae, cujuscunque portagii fuerint quoties necesse fuerit, Congregandi: & Marinarios & alios pro Navibus & Naviculis illis necessarios Eligendi, Capiendi, & in Eisdem ponendi, & Hujusmodi Marinarios qui rebelles & contrariantes fuerint in hac parte, debite Compescendi & Castigandi: & ad omnia alia Quae ad Officium Admiralli pertinent IN HAC PARTE Faciendi & Exercendi; prout de Jure & secundum Legem Maritimam fuerit faciendum.*

50 E. 3.

AND all Sheriffs, Mayors, Bailiffs, Ministers, Owners of Ships, Masters and Mariners are required to be aiding and assisting to them in the Premises.

The Admirals Commissions run exactly in the same Form.

1 R. 2.

So doth *Thomas* of *Lancaster's* Commission of High Admiral.

6 H. 4.

So doth the Earl of *Warwick's* Commission of High Admiral.

49 H. 6.

And so doth the Duke of *Richmond's*.

17 H. 8.

The Lord *Seymour's* Commission of High Admiral expresseth the Matter a little differently; the Words are, *Ac*

1 E. 6.

ad Nautas & Marinarios & alios pro omnibus & singulis Navibus, conducendum & gubernandum Necessarios, Eligendum, Capiendum & Apprehendendum, atque eosdem in dictis Navibus & Naviculis ponendum & retinendum.

IN the same year the Lord Seymour had another Commission in fuller Terms, with all the Jurisdictions and Rights of Admiralty particularly enumerated and set forth at large; the words with regard to the present matter are, *Et insuper tam Naves & Naviculas Guerinas quam quascunque alias Naves & Naviculas seu Vasa quacunque, pro quibuscunque Viagiis, seu Negotiis nostris vel Expeditione eorundem; nec non Navigeros, sive Pilotas ac Navium Magistros, Nautas, Nauceros, Vibreatores, seu Bombarditores ac Marinarios & alias Personas quascunque, pro Navibus, Naviculis seu Vasibus hujusmodi aptos & idoneos, de Tempore in Tempus quoties necesse fuerit, ubicunque Locorum infra Regna & Dominia nostra prædicta tam infra Libertates quam extra, Congregandum, Deligendum, Retinendum, Capiendum, Arrestandum, Deputandum & Assignandum absque Interruptione seu Impedimento per quemcunque in contrarium, fiendo; cum plenâ Jurisdictione & Potestate ad exequendum Omnia & Singula quæ in hac parte per Magnum Admirallum nostrum & Præfectum Generalem Classis & Marium, Jure fieri debent, possint, vel solent.*

3 E. 6.

16 Jac. I.

The Earl of Warwick had a Commission of High Admiral in the same Form.

And so had the Duke of Buckingham.*

AND now, when I consider these Precedents, not fetched from dark, remote, and unsettled Times, but running Uniformly through a Course of many Ages, all, as I conceive, speaking to the same Purpose though in different Forms of Expression; some for making Choice of, others and those the much greater Number and of the latest Date,

* The Earl of Northumberland's Commission in the Time of King Charles the First is silent with regard to these Powers; and I am inclined to think they were not inserted in any Commission in the latter Part of that Reign. But that Matter is sufficiently accounted for towards the End of this Argument.

The High Admirals since the Restoration have had all the Powers for Preferring conferred upon them in as full a Manner as in any of the Commissions I have cited; and nearly in the same Terms as in Lord Seymour's second Commission. And during such Commissions, whenever an Impress hath been ordered, it hath been by Warrants from the High Admiral. But when that Office hath been put in Commission the same Service hath been constantly carried on by Warrants from the Admiralty Board, grounded on Orders made from Time to Time by the King in Council, as the Exigency of Affairs hath required.

for making Choice of and taking up, or for arresting, pressing, and taking up, Mariners, and putting them on board for the publick Service: when I consider these Precedents with the Practice down to the present Time, I cannot conceive otherwise of the Point in Question, than that the Crown hath been always in Possession of the Prerogative of pressing Mariners for the publick Service. Which Prerogative hath been carried into Execution, as well by Virtue of special Commissions issued as the Exigency of Affairs required, as by the Persons who from time to time have been intrusted with the whole Admiralty Jurisdiction.

AND indeed, the Words touching the manning the Fleet, empowering the Admirals to do and execute all other Matters and Things touching that Service *which belong to the Office of Admiral* seem to imply, either that those Powers were deemed to be inherent in the Office, or that they had been constantly by expresse Words in the Commissions annexed to it.

To this Purpose I will mention a very remarkable Transaction in the Parliament of the 7th and 8th H. 4.

COMPLAINT was made in Parliament that the Sea-Service had been greatly neglected, and that Depredations were daily committed. To remedy this Evil a very extraordinary Expedient was offered, to which the Necessity of the King's Affairs obliged him *for the present* to submit. It was, that the naval Force of the Kingdom should for a Time, be put under the Direction of the Merchants themselves.

ACCORDINGLY an Act passed that the Merchants should have the keeping of the Seas from the first Day of May 1406 to Michaelmas 1407. And to defray the Expence of this Service they were to be intitled by Writs of Privy Seal to certain Duties mentioned in the Record, as I find it abridged by Cotton.

AMONG other Provisions touching this Matter, it was enacted that the Merchants should name two Persons, one for the North and the other for the South, who by Commission should have *the like Powers as other Admirals have* had.

Cott. 452.

453. Rot.

Parl. 8 H. 4.

N^o 19. to N^o

26.

N^o 26.

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IN Pursuance of this Act, *Nicholas Blackbourn* was named by the Merchants for the North, and *Richard Cliderow* for the South.

ONE might reasonably hope that no Powers deemed illegal or oppressive, no Powers hurtful to Trade or grievous to the Mariners, should be inserted in the Commissions of Admirals nominated by the Merchants. But it happeneth that *Blackbourn's* Commission is extant, and runneth in the very Words of those I have cited from the 50th of *E. 3.* to the 17th of *H. 8.*

8 Rym. 439. You have it in *Rymer*. It reciteth the Act of Parliament, and that *Blackbourn* had been nominated by the Merchants for the North, and then goeth on in the usual Form empowering him to make Choice of, take up and put on board such Mariners and others as shall be found necessary for the Service, and to punish and chastise such as shall be disobedient and refractory in that behalf.

THE Commission was to continue as long as the Merchants should have the keeping of the Seas, which indeed was not long. For before that Parliament rose, this Novelty came to an end: the Merchants were eased of a Service they were found to be very unequal to, their Admirals Commissions dropped, and the whole Direction of the Marine returned to its proper Channel.

8 Rym. 455. I think it may safely be inferred from this Record that in the Judgment of those Times, and in a Concern of the Merchants themselves, the Practice of manning the Navy by the Methods mentioned in these Commissions was esteemed to be necessary for the Service and a Branch of Admiral Jurisdiction. *

I come now to the Statutes which speak of this Matter.

AND I do admit that I know of no Statute now in force, which directly and in express Terms empowereth the Crown to press Mariners into the Service. And admitting that the Prerogative is grounded on immemorial Usage, I know of no Necessity for any such Statute. For let it be remembered, that a Prerogative grounded upon general immemo-

* The Parliament Roll placeth this Parliament in the 8th of *H. 4.* Whereas *Rymer*, *Dugdale*, and the printed Statutes place it in the 7th. It was, to speak in modern Language, a Parliament of the 7th and 8th of that Reign. It began in the 7th and ended in the 8th.

rial Usage not inconsistent with any Statute, nor repugnant to the publick Utility, is as much Part of the Law of *England*, as Statute-Law. You will be pleased to carry this Observation too along with you, that the Statutes which mention pressing as a Practice then subsisting and not disallowed, are at least an Evidence of the Usage, if they go no further. I mean if they do not amount to a tacit Approbation of it.

FOR it is hard to conceive, that the Legislature should frequently mention a Practice utterly illegal, and repugnant to the Principles of the Constitution as subsisting, without some Mark of Disapprobation.

THE First Statute I have met with is that of the 2 R. 2 R. 2. c. 4. 2. c. 4. It is an Act against Mariners deserting the Service; not to be met with in the later Editions of the Statutes at large, which give us only the Title of this Act, with a Note that it is altered by the 18th H. 6. and 5 Eliz.

It is however still in Force, and as such is inserted by *Rastal* in his Abridgment under Title *Mariner* No. 1. My worthy Friend Mr. *Cay* hath likewise inserted it in his Abridgment under Title *Seaman* N^o 1. I will give you the Words of the Act as far as concerneth this Point, as I find it in an Edition of the * Statutes at large ending with the last Year of H. 7. “ *Item* because that divers
“ Mariners after they be *Arrested and Retained* for the
“ King’s Service upon the Sea in Defence of the Realm
“ and thereof have received their Wages, do flee out of
“ the said Service without Licence of the Admirals or
“ their Lieutenants.—It is ordained and stablished that
“ all those Mariners which from henceforth shall do in
“ such manner—shall be holden to restore to our said
“ Sovereign Lord the King the double of that they have
“ taken for Wages, and nevertheless shall have one
“ Year’s Imprisonment without being delivered by Main-
“ prise, Bail, or by any other Way.”

THE Act then goeth on to direct how fugitive Mariners shall be apprehended and dealt with; and concludeth with this Clause, “ The like Punishment shall be made of Ser-
“ jeants of Arms, Masters of Ships and all others that shall

* It is likewise in a Collection of the Statutes at large, called *Rastal’s* Statutes, printed 1618, and in an old Collection of the Statutes called the Great Book of Statutes; and in every Edition antecedent to *Pulton’s* in 1618.

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“ be attainted before the Admiral or his Lieutenant afore-
 “ said, that they have any thing taken of the said Mariners
 “ for to suffer them to go at large out of the said Service
 “ after they have been *Arrested* for the same Service.”

You will be pleased to observe that the Word *Arrest* twice used in this Act, is made use of in the Precedents I cited of the 1st and 15th of this very Reign and in most of those of later Date: it is likewise used in Ten other Commissions in the same Reign touching this very Service, all likewise directed for Execution to Serjeants at Arms, which for Brevity sake I have omitted.

So that if it be asked who are the Persons subjected to the Penalties of this Act, it must be answered, Mariners arrested and taken into the Service by Virtue of Commissions from the Crown, in Case of their Desertion; and Serjeants at Arms, Masters of Ships and others executing such Commissions who for Lucre shall suffer them to go at large after such Arrests.

MARINERS indeed were not subject to the Penalties of this Act, unless they had received Wages. But might not a Mariner so arrested have reasonably said, I was compelled against Law into the Service, I did my Duty while I continued in it, and dearly earned the Wages I received; might not a Mariner have said this, and much more upon a Supposition of the Illegality of an Impress? Certainly he might. But you see Mariners though taken into the Service by Compulsion, are by this Act made liable to pecuniary and corporal Punishment too in Case of Desertion. † This doth *more than imply* the Legality of such Compulsion.

It may possibly be objected that the word *Retained* is used in the Act, and that a Retainer implieth a mutual Contract for some Service to be done. It may, when it standeth alone, have received that Sense in modern Language, but in strict Propriety it meaneth nothing more than the taking a Person into some Service; and is in Truth the Act only of the Person retaining or taking. And therefore

† See *Statuta de Officio Admiralitatis Angliæ*, Published by Dr. Simpson in the Year 1743, at the end of *Clarke's Praxis Supremæ Curie Admiralitatis*.—Articles 10. 37. 39. And the learned Doctor's Notes on those Articles touching Ships and Mariners pressed into the King's Service.

when I see the Word *retained* connected with one which hath no other Meaning in the *English* Tongue than what carrieth with it the Idea of Compulsion, I cannot conceive that the Legislature speaking of Persons *arrested* and *retained* should mean no other, than Persons taken into the Service with their own Consent.

THAT there was a Practice then subsisting of taking Mariners into the Service by Compulsion cannot be denied: the Parliament could not be ignorant of it. Is it possible then to imagine, that they could use a Word which manifestly signifieth Compulsion, and yet mean nothing more than a mutual Contract? Besides, it cannot be conceived that Serjeants at Arms, who as I before observed were the Persons about that Time usually employed in the Service of pressing, could be expressly and by Name subjected to the Penalties of the Act, if no Mariners but such as voluntarily entered into the Service were comprehended in it.

THE next Act is that of the 2d and 3d Ph. and Mar. 2, 3 Ph. & which layeth a Penalty on Watermen plying between Mar. 16. *Gravesend* and *Windſor*, who, to speak in the Language of the Act, “in the Time of pressing by Commission for the Service of the Crown upon the Sea do willingly and “*obſtinately* withdraw, hide and convey themselves into “secret Places and Out-corners; and after such Time of “pressing is over-passed, return to their Employments.”

THIS Provision 'tis true extendeth only to Watermen on the *Thames*, and may be considered as one of the many wholesome Regulations those Persons are brought under by this Act. And it is mentioned in that Light in an Act 4, 5 A. c. 19. passed in the late Queen's Time. But at the same Time S. 18. it sheweth that Commissions for pressing were then in Use. And in my Opinion it likewise supposeth the Legality and Utility of such Commissions, and that these People are the Objects of them. Otherwise why are they subjected even to the slightest Punishment, for absconding at the Time of the Execution of those Commissions.

THE Acts which come next to be considered are some made since the Revolution. A most auspicious Period! When the Principles of Liberty were well understood, and most gloriously asserted.

THESE

THESE are the 7th and 8th of King *William*, the 2d and 3d and 4th and 5th of the late *Queen*.

7 & 8 W. 3.
c. 21.

THE First is intitled *An Act for the Increase and Encouragement of Seamen*.

Sect. 15.

IT enacteth, among other things, that Licences may be given by his Majesty or the Lord High Admiral or Commissioners of Admiralty to any Landmen willing to enter into the Merchants Service ; which shall be a Protection to them *against being impressed for the space of two Years*.

PROVIDED such Landmen bring two credible Persons to vouch for them. But if any Person shall vouch for any one as a Landman who shall afterwards appear to have been a Seaman, he shall forfeit twenty Pounds.

2 & 3 A. c. 6.

THE 2d and 3d of the late *Queen* is intitled *An Act for the Increase and better Encouragement of Navigation and Security of the Coal Trade*. To these Ends it empowereth Parish Officers to bind out poor Boys to Sea in the Merchants Service. And enacted that Boys so bound out shall not be compelled or *impressed* or permitted to enter into the Service of the Crown at Sea 'till they attain their Age of Eighteen. And that Certificates of such Binding shall be transmitted by the Collectors of the respective Ports to the Admiralty : and that thereupon Protections shall be made for such Apprentices without Fee or Reward.

Sect. 4, 5.

Sect. 15.

AND for encouraging other Persons to bind themselves Apprentices in the Merchants Service, it further Enacteth, that Persons so binding themselves shall not be *Compelled or Impressed* into the Service of the Crown for three Years from the Time of such Binding. And that upon Certificates of such Binding from the Collectors of the respective Ports, the Admiralty shall grant Protections without Fee or Reward.

Sect. 20.

AND for encouraging the Coal Trade, It further enacteth, that during the War there shall be allowed to every Vessel employed in that Trade besides the Master, Mate, and Carpenter, one able Seaman for every one hundred Tun of the Vessel not exceeding three hundred Tun, *free from Impressing*.

4, 5 Ann. c.
19. Sect. 17.

THE 4th and 5th of the late *Queen* reciteth that Clause in the Act of the 2d and 3d, which exempted Voluntary Apprentices for three Years, and saith, " Whereas such
" Exemption

“ Exemption for three Years, which was intended for
 “ the encouragement of Landmen to bind themselves,
 “ hath been manifestly abused for the exempting and pro-
 “ tecting of Seamen from the Service, to the great Hin-
 “ drance and Prejudice of her Majesty’s Sea-Service,
 “ therefore be it enacted and declared that no Person
 “ or Persons of the Age of eighteen Years shall have any
 “ Exemption or Protection from her Majesty’s Sea-Ser-
 “ vice, who shall have been in any Sea-Service before
 “ the Time they so bound themselves, any Law or Sta-
 “ tute to the contrary notwithstanding.” †

LET us now take a short View of these Acts.

PERSONS under certain special Qualifications are ex-
 empted from being impressed.

To that end in one Case, Licences are to be granted
 by His Majesty or from the Admiralty, *but under proper
 Caution to prevent Abuses.*

IN other Cases, Certificates are to be returned from
 the chief Officers of the Ports, and Protections there-
 upon granted without Fee or Reward.

AND in every Case these Exemptions, as they are con-
 fined to Persons under certain limited Qualifications, so
 are they limited too in Point of Time *and withal given
 by Way of Encouragement.* And lastly, the extending
 the Benefit even of a temporary Exemption beyond the
 original Intent of the Legislature, is declared to be an
 Abuse, and an Abuse tending to the great Hindrance and
 Prejudice of her Majesty’s Sea-Service.

Do not these Things incontestably presuppose the Ex-
 pediency, the Necessity, and the Legality of an Impress
 in general? If they do not, one must entertain an Op-
 inion of the Legislature acting and speaking in this Man-
 ner, which it will not be decent for me to mention in
 this Place.

FOR the very Notion of an Exemption when granted
 by Statute to particular Persons, and this too by way of
 Encouragement, implieth that without such Exemption
 the Parties intitled to the Benefit of it, would by Law be lia-

† N.B. Other Acts to the like Purpose which did not occur
 to the Author when this Argument was delivered are, 1 *Annæ*,
 Sect. 1. c. 16. Sect. 2. 6 *Annæ*, c. 31. Sect. 2. 13 *Geo.* 2. c. 17.
 Sect. 1. 2. 3. and c. 28. Sect. 5.

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ble to the Duty or Burden which is the Subject-matter of that Exemption : otherwise the Statute doth nothing, it operateth upon nothing, if no legal Duty or Burden be removed by it. And consequently the granting Exemptions to Seamen under certain limited Qualifications, and for a limited Time only, supposeth that all Seamen in general without such Exemption, were by Law liable to the Duty or Burden which is the Subject-matter of that Exemption.

AND the many Provisions the Legislature hath made to prevent Abuses with Regard to these Exemptions, attended with a plain, full and expresse Declaration, that such Abuses, *namely the extending the Benefit of Exemptions beyond the Intent of the Legislature*, tend to the great Hindrance and Prejudice of the Sea-Service, imply that the Duty or Burden which is the Object of all this Care and Caution, is expedient and necessary to the Service.

AND this Burden is plainly an Impress in Time of War.

WHICH from the Authorities I have cited appeareth to me to be grounded on Common and Statute-Law. In other Words, upon a general immemorial Usage, allowed, approved, and recognized by many Acts of Parliament.

AGAINST what I have said, it hath been objected that the Practice of pressing is inconsistent with the Liberty of the Subject, and a Breach of *Magna Charta*.

I readily admit that an Impress is a Restraint upon the natural Liberty of those who are liable to it. But it must likewise be admitted on the other Hand, that every Restraint upon *Natural* Liberty is not *Eo Nomine* illegal, or at all inconsistent with the Principles of *Civil* Liberty. And if the Restraint, be it to what Degree soever, appeareth to be necessary to the Good and Welfare of the whole, and to be warranted by Statute-Law, as well as immemorial Usage, it cannot be complained of otherwise than as a private Mischief : which as I said at the beginning, must under all Governments whatsoever, be submitted to for avoiding a publick Inconvenience.

As to *Magna Charta*, it is not pretended that the Practice of pressing Mariners for the publick Service is condemned by expresse Words in that Statute. And if it be

warranted

warranted by Common and Statute-Law, it cannot be shewn to be illegal by any Consequences drawn from *Magna Charta*. In like manner as pressing for the Land-Service could not be deemed illegal, or inconsistent with the Principles of our Constitution, while there were temporary Acts (as there were many in the late War) to warrant it.

BESIDES, we know that *Magna Charta* hath been expressly and by Name confirmed by many Acts of Parliament, my Lord *Coke* saith 32. And yet the Practice of pressing Mariners still continued through all Ages, and was never that I know of, once mentioned in any of those Acts as illegal or a Violation of the Great Charter.

IN a similar Case, I mean the Practice of pressing Soldiers for foreign Service, there are Statutes of an early Date which, I conceive, were intended against it; though it was practised long afterwards. But those Acts extend only to the Case of pressing for the Land-Service, not a Word do I find in them touching the Sea-Service. One Reason of the Difference, among others, may be that the Land-Service was thought to be sufficiently provided for in ordinary Cases by the military Tenures: and extraordinary Cases, Cases of Necessity, such as that of a foreign Invasion, were expressly excepted. In those Cases saith the 1 E. 3. *it shall be done as in Times past*. Which we know was by Commissions of Array. Whereas no competent Provision was made by Law for the ordinary Sea-Service. There were no naval Services due to the Crown, except those of the Cinque Ports and a very few others; which all together were too inconsiderable to be mentioned, and bore no sort of Proportion to the common Exigencies of the Publick in Time of War.

BUT there is another Objection which deserveth to be considered. It is, that temporary Acts have from time to time been made authorizing the pressing Mariners for the Sea-Service. From whence it is argued, that the Legislature which is supposed to do Nothing in vain, would not have given those Powers for a Time, if the King by his Prerogative could have provided for the Service without the Aid of such temporary Acts.

1 Vol. 679.
in margine.

THE Gentleman who had the Care of publishing Lord Chief Justice *Hale's* History of the Pleas of the Crown, referreth to several temporary Acts made in the late Queen's Time authorizing, as he supposeth, the pressing of Soldiers and *Mariners*. I have looked into all those Acts. They are solely for pressing Soldiers and *Marines*. Not a single word that concerneth the pressing of *Mariners* do I find in any one them.

4, 5 Annæ,
c. 19.

THERE was indeed an Act made in that Reign for compelling *Mariners* into the Service, by Methods which it was then thought the Prerogative alone could not warrant. To that End it authorized and required Justices of the Peace and other Magistrates, to cause privy Searches to be made from time to time for *Mariners* who as the Act expresseth it, *did lie hid, withdraw, and conceal themselves*, and to deliver them when apprehended to Conductors for the Service of the Crown. And Constables and other Officers were by Warrants from the Magistrates, to make privy Searches by Night, and were impowered to enter Houses and open Doors in Execution of such Warrants; and were required to give an Account of their Proceedings from Time to Time to the Magistrates on Oath; and in Case of Negligence or Remissness in the Premises, were subjected to pecuniary Punishments. This is the Substance of the first nine Sections of the Act; which Sections continuing in Force only 'till the first of *March* 1706, are not printed in the later Editions of the Statutes at large.

BUT it cannot, I conceive, be inferred from the new Powers given by this Act, that an Impress by Commission from the Crown or by Admiralty-Warrants, which was practised at that very time, was illegal. All that can be inferred is, that the ordinary Methods then in Use were found ineffectual: and therefore the Legislature had for that Time Recourse to an extraordinary one, for compelling into the Service those, who could not be come at by the ordinary Methods; those, who, in the Language of the Act, *lay hid, withdrew, and concealed themselves*. And to that end, civil Magistrates and civil Officers are required and authorized to do, what in the Judgment of the Legislature without the Aid of that Act, they could not have done, or at least were not compellable to do.

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And whoever readeth and considereth the 17th and 18th Sections of this Act, which I have already cited to another Purpose, will hardly conceive, that That Parliament had any Doubts concerning the Legality of an Impress by the ordinary Methods of Law.

INDEED the temporary Acts of the 16th and 17th Car. 16 & 17 Car. I. come directly to the Point. They authorized an Impress by Admiralty-warrants for a limited Time. And had temporary Acts of that Kind been frequent, or had the Practice of Pressing been discontinued from the Time of *Charles* the First, unless when revived by subsequent temporary Acts, I think what hath been said upon the Foot of antient Precedents could, after all, have had very little Weight. For I freely declare that antient Precedents alone, unless supported by modern Practice, weigh very little with me in Questions of this Nature, I mean, in Questions touching the Prerogative. But we all know that the Practice of pressing by Admiralty-Warrants hath continued now near a Century, since the Expiration of those Acts of King *Charles* the First, without one Statute of the like Kind to authorize it. 1. c. 5. 23. 26.

THESE Acts of King *Charles* the First do indeed shew that the Prerogative of pressing Mariners into the publick Service was at that Time *doubted of*. And whoever considereth the peculiar Circumstances of that Time, when the Pretogative had in too many Instances been carried to great Lengths, and when the Nation was at the very Eve of a civil War upon the Subject of Liberty and Prerogative, and considereth withall that a naval Force must in all Events, as Things then stood, be provided; whoever I say considereth these Things, will not wonder that the Prerogative of pressing Mariners should at that very critical Time be called in Question; or that in order to procure an universal Submission to a Measure *necessary at that Time*, the Authority of Parliament should be called in, in Aid of the Prerogative.

THERE was a temporary Act made in this very Session for pressing for the Land-Service. It reciteth that a Rebellion was on Foot in *Ireland*, and then declareth, almost in the Words of 1 E. 3. before cited, *that by Law no Man is compellable to go out of his County to serve as a* c. 28.

M

Soldier,

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Soldier, except in Case of Necessity of sudden coming of strange Enemies into the Kingdom, or except he was bound thereto by Tenure.

IT is worth observing, that no such Declaration saving the Rights of the Subject is to be found in any of the Acts of this Session for pressing Mariners. And the different Penning of these Acts made in the same Session, and touching Cases of so similar a Nature, strongly intimateth, that the Point was not even, at that critical Time, thought equally clear in the one Case as in the other. The same Observation occurreth with Regard to the different Penning of all the Acts of the late Queen for pressing Soldiers and Marines, and of that for Pressing Mariners; the former declare that it was necessary at that Time of War, that Soldiers and Marines should be raised by the Methods prescribed in the Acts, "By common Consent and Grant in Parliament." These are the Words of the Act, and they are the very Words made use of to the same Purpose in the 25th E. 3. already cited. The latter without any such Declaration barely empowereth and requireth Magistrates and other Peace-Officers to make search for and apprehend Mariners, who then lay hid, withdrew and concealed themselves, and to send them into the Service.

1. Vol. 678.

The Chapters are mis-numbered, they are 5. 23. 26.

LORD Chief Justice *Hale* in his History of the Pleas of the Crown, speaking of the Legality of pressing which he indeed seemeth to doubt of, saith, "He that looketh upon the Acts enabling pressing Soldiers and Mariners for foreign Service upon or beyond the Sea, namely 17 Car. c. 12. 25. 26. may think those Times made some Doubt of it. But of this," saith he, "I deliver no Opinion."

THAT learned Man, you see, carrieth the Inference from these temporary Acts no further than to render the Matter doubtful, and so he leaveth it. But had he lived to see the Practice of pressing Mariners continue near a Century longer, and especially had he seen this Practice treated by the Legislature in the Manner the Acts made since the Revolution treat it, I think what was then but Matter of Doubt would have now appeared to him in a different Light. I confess it doth so to me. For Rights of every Kind which stand upon the Foot of Usage, gradually receive

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ceive new strength in Point of Light and Evidence from the continuance of that Usage; as it implieth the tacit Consent and Approbation of every successive Age in which the Usage hath prevailed. But when the Prerogative hath not only this tacit Approbation of all Ages, the present as well as the former on it's side, but is recognized or evidently presupposed by many Acts of Parliament, as in the present Case I think it is, I see no legal Objection that can be made to it.

I make no apology for the length of my Argument, because I hope the Importance of the Question will be thought a sufficient Excuse for me in that respect. For it is no more nor less than, whether the only effectual Method yet found out for manning our Navy in Time of War, for raising that number of Mariners *which the Legislature from Time to Time declare to be necessary* for defending our Coast and protecting our Trade, Whether this Method be legal or no. This I say is the Question. And therefore I could not satisfy myself without entering as far into the Merits of it as I could.

AND I have delivered my Opinion upon it without any reserve.

END OF THE REPORT.

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DISCOURSE I.

O N

HIGH TREASON.

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MORAN

INTRODUCTION

TO THE

DISCOURSE on HIGH TREASON.

HIGH TREASON being an offence committed against the Duty of Allegiance, it may be proper, before I proceed to the several Species of that Offence which will be the Subject of this Discourse, to consider from whom, and to whom Allegiance is due.

SECT. I. WITH regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places. This is what we call *Natural* Allegiance, in contradistinction to that which is local. The Duty of Allegiance, whether natural or local, is founded in the relation the Person standeth in to the Crown, and in the Privileges he deriveth from that Relation. Local Allegiance is founded in the Protection a Foreigner enjoyeth for his Person, his Family or Effects during his Residence here; and it ceaseth whenever he withdraweth with his Family and Effects. Natural Allegiance is founded in the Relation every Man standeth in to the Crown, considered as the Head of that Society whereof he is *born a Member*; and on the peculiar Privileges he deriveth from that Relation, which are with great Propriety called his *Birthright*. This Birthright nothing but his own Demerit can deprive him of; it is indefeasible and perpetual. And consequently the Duty of Allegiance which ariseth out of it, and is inseparably connected with it, is in Consideration of Law likewise unalienable and perpetual.

THE Merits of Dr. Storey's Case in point of substantial Justice, turned singly upon the Doctrine of natural Allegiance*. And in a very modern Case this Doctrine was treated by the Court as a Point never yet disputed. How far prudential Considerations grounded on Reasons of State or even the Principles of natural Equity, may under certain

* *Aneas M^r Donald's Case* on the special Commission in Surry 1746, reported before.

DISCOURSE I.

Circumstances induce the Crown to dispense with a rigorous Execution of a Law, extremely right and expedient considered as a general Rule, falleth not within the Compass of my present Enquiry.

THE Doctrine of Allegiance founded in Birth may, as I have said, be considered as a good General Rule, though not universally true. Cases may be put which will be considered as Exceptions to it, which I will not enter into at this Time. Whenever they come in Judgment, due Regard will certainly be paid to them.

AND whenever in the Case of Individuals the General Rule shall be found to border on the *summum jus*, the Benignity of our Law hath provided a proper Resource in the Equity of the Crown; I say the Equity of the Crown, for Mercy to Individuals when properly conducted is founded in Natural Equity, and in the Principles of our Constitution.* It is nothing more than weighing the Merits of each Case all Circumstances considered, in the Scale of Wisdom and sound Policy, against the Rigour of the Law.

MR. *McDonald*, whose Case I have just mentioned, was pardoned upon very Equitable and easy Terms.

THERE have been Writers who have carried the Notion of natural, perpetual, unalienable Allegiance much farther than the Subject of this Discourse will lead me. They say, very truly, that it is due to the Person of the King; and from thence have drawn Consequences, which do not fall within the Compass of the present Inquiry, and shall therefore be passed over. It is undoubtedly due to the Person of the King; but in that respect natural Allegiance differeth nothing from that we call local. For Allegiance considered in every Light is alike Due to the Person of the King; and is paid, and in the Nature of Things must constantly be paid, to that Prince who for the Time being is in the Actual and Full Possession of the Regal Dignity. The well-known Maxim which the Writers upon our Law have adopted and applied to this Case, *Nemo potest exuere Patriam*, comprehendeth the whole Doctrine of Natural Allegiance, and expresseth my Sense of it.

* See the Coronation Oath, "Will You to your Power cause Law and Justice *in Mercy* to be executed in all Your Judgments?"

SECT. 2. AN Alien whose Sovereign is in Amity SECT. 2.
with the Crown of *England*, residing here and receiving
the Protection of the Law, oweth a local Allegiance to
the Crown during the Time of his Residence. And if,
during that Time he committeth an Offence, which in
the Case of a Natural-born Subject would amount to
Treason, he may be dealt with as a Traitor. For his
Person and Personal Estate are as much under the Pro-
tection of the Law as the Natural born Subject's: and
if he is injured in either, he hath the same Remedy at
Law for such Injury.

SECT. 3. AN Alien whose Sovereign is at Enmity SECT. 3.
with us living here under the King's Protection,* com-
mitting Offences amounting to Treason, may likewise
be dealt with as a Traitor. For he oweth a tempo-
rary local Allegiance, founded on that Share of Protec-
tion he receiveth.

SECT. 4. AND if such Alien seeking the Protection SECT. 4.
of the Crown, having a Family and Effects here, should
during a War with his Native Country, go thither and
there adhere to the King's Enemies *for Purposes of Hosti-*
lity, he might be dealt with as a Traitor. For he came
and settled here under the Protection of the Crown. And
though his Person was removed for a Time, his Effects
and Family continued still under the same Protection. MSS. Tracy,
This Rule was laid down by all the Judges assembled at Price, Dod,
the Queen's Command Jan. 12th 1707. and Denton.

It is to be observed that the Judges in the Resolution
last cited laid a considerable Stress on the Queen's Declara-
tion of War against *France* and *Spain*; whereby she took
into her Protection the Persons and Estates of the Subjects
of those Crowns residing here and demeaning themselves
dutifully, and not corresponding with the Enemy. King
William and *Queen Mary* did the same in their Declara-
tion of War against *France*, and so did his late Majes-
ty. These Declararions did in fact* put *Frenchmen* residing
here and demeaning themselves dutifully, even in Time of

* See 9. A. c. 16. the Judgment of Parliament touching
the Case of the Marquis *de Guiscard* residing here during the
War and holding a traiterous Correspondence with *France*.
War,

War, upon the Foot of Aliens coming hither by Licence or Safe-conduct. They enabled them to acquire personal Chattels and to * maintain Actions for the Recovery of their Personal Rights in as full a manner as Aliens *Any* may.

BUT as I said before, all Aliens *Enemy* residing here under the Protection of the Crown, though possibly not favoured as the Persons last mentioned, yet they, in Case they commit Crimes which in a Subject would amount to Treason, may be dealt with as Traitors. For their *Persons* are under the Protection of the Law; and in Consequence of that Protection, they owe a local temporary Allegiance to the Crown.

SECT. 5.

4 St. Tri.
687. 689.
Cranbourn's
Case. Salk.
633.

SECT. 5. IN the Case of Treason committed by an Alien, the Indictment must charge that it was done *Contra Ligeantiae suae debitum*, leaving out all the Words which import a *Natural* Allegiance. These Words are generally used in the Case of Natural-born Subjects, but they are not absolutely necessary even in those Cases. They may be omitted, and many Precedents there are where they have been omitted: for every Species of Allegiance is comprized under the general Word Allegiance. And therefore, in my Opinion, the safer Way is to omit them in all Cases; were it but to keep clear of the Difficulties mentioned in the next Section.

SECT. 6.

SECT. 6. IT was said by the Court in the Case of *Cranbourn* cited in the last Section, that if an Alien be Indicted for Treason *Contra NATURALEM Dominum*, or *Contra NATURALIS Ligeantiae suae debitum*, the Defendant may give *Alienage* in Evidence. And if that appeareth, he shall be acquitted; because the Indictment chargeth a Breach of that Species of Allegiance which is not due from an Alien. But it ought to be observed that that Point was not then in Judgment before the Court nor could be; for *Cranbourn* was a natural-born Subject. And that when it did come directly under Consideration, as it did many

* See the Case of *Wells* and *Williams*, Salk. 46. Lutw. 34. L^d Raym. 282. Pasch. 11. Annæ, a like Case in *Trower* by the Adm^r of *Guiscard* mentioned in the Marginal Note on Section 3.

Years afterwards in the Case of Mr. *Francia a Frenchman*, 6 St. Tri. 87. born at *Bordeaux* and never naturalized, the Court did 88. not go so far as to direct the Jury to acquit him in Case they were satisfied of his Birth within the Dominions of the *French King*, but told them, that if they thought him guilty of the Charge in the Indictment, they should find him so, and withall find that he was an Alien born in the Dominions of the *French King*: this I presume was done in order that the Point might be further weighed and considered on a special Verdict. But the Jury acquitted him of the whole Charge, and so the Point never came in Judgment. And I do not find that it was ever judicially determined, though there are many *Dicta* in the Books which favour the Opinion delivered in *Cranbourn's Case*. I think that Opinion is good Law, for the Reason before given.

SECT. 7. THE Case of an Ambassador or his Attendants not being Subjects of *Great Britain* mentioned by Lord *Hale*, doing Acts which in a Subject would amount to High Treason, will, as his Lordship observeth, be always governed rather by prudential Considerations, or what are generally called *Reasons of State*, than by any fixed Rules of Law. And as Ambassadors generally Act under Direction and by Orders from their Sovereign, they have seldom been proceeded against further than by Imprisonment, seizing their Papers and sending them Home in Custody. Which was done in the Case of Count *Gyllenberg* the *Swedish* Minister in King Geo. 1st Time.

SECT. 7.

1. Hale 95--
100.

BUT whatever Proceedings be against them for State Crimes, they are to be considered at the worst but as Enemies subject to the Law of Nations; never as Traitors subject to our municipal Laws, and owing Allegiance to the Crown of *Great Britain*. Unless perhaps in Case of Attempts directly and immediately against the Life of the King; in which Case no Orders from their Sovereigns can be presumed, or if in Fact produced, would justify or excuse. And therefore I shall not take their Case into Consideration in this Place. And for the same Reason I say nothing of the Case of Spies taken here in time of War, *actual*

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tual Hostilities being on foot in the Kingdom at that Time, nor of Prisoners of War.

BUT for Murder and other Offences of great Enormity, which are against the Light of Nature and the Fundamental Laws of all Society, the Persons mentioned in this Section are certainly liable to answer in the ordinary Course of Justice, as other Persons offending in the like Manner are. For tho' they may not be thought to owe Allegiance to the Sovereign, and so incapable of committing High Treason, yet they are to be considered as Members of Society; and consequently bound by that eternal universal Law by which all civil Societies are united and kept together. †

SECT. 8. PROTECTION and Allegiance are reciprocal Obligations, and consequently the Allegiance due to the Crown must, as I said before, be paid to him who is in the full and actual Exercise of the regal Power, and to none other. I have no Occasion to meddle with the Distinction between Kings *de facto* and Kings *de jure*, because the warmest Advocates for that Distinction, and for the Principles on which it hath been founded, admit that even a King *de facto* in the full and sole Possession of the Crown, is a King within the Statute of Treasons; it is admitted too, that the Throne being full, any other Person out of Possession but claiming Title, is no King within the Act, be his Pretensions what they may.

THESE Principles I think no Lawyer hath ever yet denied. They are founded in Reason, Equity and good Policy.

SECT. 9. A Prince succeeding to the Crown by Descent, or by a *previous Designation of Parliament*, is from the Moment his Title accreweth, a King to all Intents and Purposes within the Statute of Treasons; antecedent to his own Coronation, or to any Oaths or Engagements taken to him

† At the Gaol Delivery for the City of *Bristol* in *August* 1758, *Peter Molieres* a French Prisoner of War, was indicted for privately stealing in the Shop of a Goldsmith and Jeweller a Diamond Ring valued at £ 20. I thought it highly improper to proceed capitally upon a *Local Statute* against a Prisoner of War; and therefore advised the Jury to acquit him of the Circumstance of Stealing *in the Shop* and to find him Guilty of simple Larceny to the Value laid in the Indictment. Accordingly he was burnt in the Hand and sent to the Prison appointed for French Prisoners.

him on the Part of the Subject. For as on the one hand, the Solemnity of a Coronation doth not *confer, but presupposeth* a Right to the Allegiance of the Subject inherent in the Person of the King; so on the other, the Duty of Allegiance doth not flow from any Oaths or Engagements taken on the part of the Subject. For in both Cases an antecedent Duty is presupposed which is intended to be secured by those explicit Engagements.

I am however very far from thinking that the Solemnity of a Coronation is to be considered among us merely as a Royal Ceremony, or as a bare Notification of the Descent of the Crown, as Authors of high Distinction have been pleased to express themselves. I admit that it is, on the part of the Nation, a publick solemn Recognition that the Regal Authority, and all the Prerogatives of the Crown are vested in the Person of the King, antecedent to that Solemnity. But the Solemnity of a Coronation with us goeth a great deal farther. The Coronation Oath importeth on the Part of the King, a public solemn Recognition of the fundamental Rights of the People; and concludeth with an Engagement under the highest of all Sanctions, that he will maintain and defend those Rights; and to the utmost of his Power make the Laws of the Realm the Rule and Measure of His Conduct.

Coke and
Hale.

SECT. 10. THE Reader observeth that in the preceding Section I take it for granted that a Title to the Crown may be founded, as well on a Designation by Parliament as on hereditary Descent. I never entertained a Doubt of this Matter, though I am aware that some Lawyers of high Rank have gone upon a contrary Principle. For though the Crown hath, upon Principles of great Wisdom and sound Policy, been in all Ages considered as a descendable Right, vested in and appropriated to the Royal Line, and hath in Fact continued in that Line ever since the Conquest, yet it is certain that the Course of Descent in that Line hath been frequently interrupted by Authority of Parliament.

SECT. 10.

SECT. 11. LORD Chief Justice *Hale* after mentioning the Cases of *Ed. 2^d* and *R. 2^d* is pleased to say, that the former

SECT. 11.
1. Hale 105.

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former was considered by Parliament *even after his Resignation and Deposition*, as a King against whom High Treason may be committed. This he groundeth on the Attainders of those who were concerned in the Murder of him. But those Attainders seem to me to have been grounded singly on a Principle of Law which then prevailed, *that compassing the Death of the Father of the King was High Treason*. And Lord Chief Justice Coke accounteth for those Attainders upon this Principle, and upon no other.

3. Inst. 7.

I have in another Discourse entered largely into this Question, and those touched upon in the 8th and 10th Sections; and therefore I say no more of them in this Place.

SECT. 12.

SECT. 12. I will conclude this Introduction with a few words, touching Clergy in the Case of Treason.

25. E. 3.

Stat. 3. c. 4.

THE Statute *de Clero* provideth that Clerks convict for Treasons or Felonies touching *other Persons than the King Himself or His Royal Majesty* shall have the Privilege of Holy Church. In consequence of this Statute meer Felonies of all Kinds became intitled to Clergy. And Petit-Treason likewise became so intitled, 'till ousted by Statute. It was Treason of a more Private Nature, and not in consideration of Law committed against the *Person of the King or His Royal Majesty*.

As the Benefit of Clergy in the Case of Felony is not confined to such Offences as were Felony at the Time of making this Statute, but in favour of Life, or rather of what the Ignorance and Superstition of former Times called, *the Privilege of Holy Church*, is extended to all new-created Felonies; unless taken away by the Statute creating such Felony, or by some other: So on the other Hand, by parity of Reason and in Justice to the Crown and the Publick, all new-created Treasons which in Judgment of Law are levelled at *the Person of the King or His Royal Majesty* are excluded, without special Words for that Purpose, as coming within the Exception of this Statute.

2. Hale 332.

HALE, it is true, saith, that in all Cases of High Treason whether declared so by the Statute of Treasons or newly enacted since, the Privilege of Clergy is taken away. The Rule is general, but I apprehend the learned Author must

must be understood with some Limitation. All Sorts of High Treason *touching the Person of the King or His Royal Majesty*, come within the Exception in the Statute *de Clero*, and consequently are ousted without special Words. But when Offences of a more private Nature, which for the most part terminate in an Injury done to Particulars, have by Reason of their Odiousness and for publick Example been made High Treason, or when that hath been attempted; of which the Instances have been very rare, it hath been deemed expedient to take away Clergy by expresse Words for that Purpose. For such new-created Treasons of a private Nature, could not with any Sort of Propriety be said to touch the *Person of the King or His Royal Majesty*.

I will give a few Instances of each Kind of Statute-Treasons, which will serve to explain and establish the Distinction I am aiming at.

THE new-created Treasons concerning the Coin and Seals are Treasons *of the same Kind* with those declared so by the Statute of Treason and come under the same Rule. They all are Treasons *against the Royal Majesty of the King*.

THE Treasons created by Statutes made for Abolishing the Papal and Establishing the Regal Supremacy, for avoiding Doubts touching the Succession of the Crown and for establishing such Succession, for the Punishment of seditious and defamatory Libels tending to create Doubts and Suspicions touching the King's Title or Government or the Royal Issue; these Treasons and others of the like Nature, of which Instances more than enough may be met with in the Statute Book, having a direct Tendency in the Judgment of the Legislature to disturb the Peace and Tranquillity of the Kingdom, and to endanger the Stability of the Government, come within the Exception of the Statute *de Clero*, as being Treasons touching the *Person of the King or His Royal Majesty*. And accordingly such of them as still exist, are ousted of Clergy without any expresse Provision for that Purpose.

BUT with regard to the lower Species of Treasons, hinted at above, as terminating in Injuries done to Particulars, the Law hath been taken to be otherwise.

c. 9.

Cotton's
Abr. 684.

THE 22^d of H. 8. made wilful Poisoning High Treason, and enacted that the Offenders should be boiled to Death. *This Act by exprefs Words took away Clergy.*

IN the 8th of Edw. the 4th a Petition was tendered to the King in Parliament by both Houses, which in those Days was the ordinary Method of tendering Bills for the Royal Assent, that Sacrilege should be deemed High Treason and the Offenders *Burnt to Death*. Here likewise Provision was made by exprefs Words, that Clergy should be taken away, and the Appeal for Restitution saved. To this extraordinary Petition the King returned an Answer, becoming the Royal Majesty of the Crown.

LE ROY S'AVISERA.

THE Use I make of these Precedents is to shew, that in the Case of these inferior Treasons terminating in Injuries done to Particulars, it was thought expedient to take away Clergy by exprefs Words for that Purpose; these Treasons not being considered as done against the *Person of the King or His Royal Majesty*.

8. H. 6. c. 6.
See Raftal's
Statutes.

The 8th of Hen. the 6th may seem to be an Exception to the Rule I am advancing. For it made the wilful Burning of Houses under some *Special Circumstances therein mentioned bordering upon Acts of open Hostility* High Treason, without any exprefs Ouster of Clergy.

1. Hale 571.
2. Hale 346.

BUT *Hale* informeth us that some Gentlemen of the Profession in his Time, considered the Offence of meer *Arson* unattended with Circumstances of special Aggravation as an Act of *Publick Hostility*, and therefore ousted at Common Law and not helped by the Statute *de Clero*; and that *Noy* declared this to be his Opinion in the Court of King's Bench about the 8th of *Charles* 1st. He adds, "And this seemed to be assented to by the Court."

THE Learned Judge doth not Himself assent to it. But it is plain that the Legislature in framing the Act of the 8th of *Henry* 6. considered the Offence of burning Houses and Destroying Goods *under the Circumstances of deep Aggravation therein mentioned*, as an Offence of a treasonable Kind antecedent to that Act. And therefore probably they might not think it necessary to oust Clergy by exprefs Words for that Purpose.

THE

OF HIGH TREASON.

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THE Preamble recited that the Houses and Goods of divers Persons had been then lately feloniously and *traiterously* burnt and destroyed. The Statute then enacted that *such* Burning of Houses shall be adjudged High Treason. And that this Ordinance shall extend to all *such* Burnings *since the first Day of the King's Reign*, as well as to all future Burnings.

A Retrospect of more than seven Years in a Case so Penal would have been thought a most extraordinary Measure, if the Offence had not in the Judgment of that Parliament partaken of the Nature of High Treason *antecedent* to the Statute. Nor could former Offences of the like Kind upon any other Supposition, be with Propriety said to have been *Traiterously* committed.

CHAP. I.

Of High Treason in Compassing the King's Death.

THE antient Writers in treating of felonious Homicide considered the felonious Intention manifested by *plain Facts*, not by bare Words of any Kind, in the same Light in Point of Guilt, as Homicide itself. The Rule was *Voluntas reputatur pro Facto*. And while this Rule prevailed, the Nature of the Offence was expressed by the Term *Compassing* the Death. 3. Inst. 5.

THIS Rule hath been long laid aside as too rigorous in the Case of common Persons. But in the Case of the King, Queen, and Prince, the Statute of Treasons hath with great Propriety retained it in it's full Extent and Rigour: and in describing the Offence hath likewise retained the antient Mode of Expression. "When a Man doth *compass* or *imagine* the Death of our Lord the King, or of our Lady his Queen, or their Eldest Son and Heir, and thereof be [*provablement*] upon sufficient Proof attainted of open Deed by Men of his Condition." Ibid. 25. E. 3.

SECT. I. THE Words of the Statute descriptive of the Offence must be strictly pursued in every Indictment for this Species of Treason. It must charge that the Defendant

CHAP. I. fendant did traiterously *compass and imagine*, &c. and then go on and charge the several Overt-Acts as the Means employed by the Defendant for executing his traiterous Purposes. For the Compassing is considered as the Treason, the Overt-Acts as the Means made use of to effectuate the Intentions and Imaginations of the Heart. And therefore in the Case of the Regicides, the Indictment charged that they did traiterously compass and imagine the Death of the King. And the taking off his Head was laid, among others, as an Overt-Act of Compassing: And the Person who was supposed to have given the Stroke was convicted on the same Indictment.

Keil. 8.

V. Chap. 2.
Sect. 13.

FROM what hath been said it followeth, that in every Indictment for this Species of Treason, and indeed for levying War, or adhering to the King's Enemies, an Overt-Act must be alledged and proved. For the Overt-Act is the Charge to which the Prisoner must apply his Defence. But it is not necessary that the whole Detail of the Evidence intended to be given should be set forth: The Common Law never required this Exactness, nor doth the Statute of King *William*, which will be considered in it's proper Place, require it. It is sufficient that the Charge be reduced to a reasonable Certainty, so that the Defendant may be apprized of the Nature of it, and prepared to give an Answer to it.

1. Hale 122.
4. St. Tri.
Lowick.
6. St. Tri.
Layer.

AND if divers Overt-Acts are laid and but *one proved*, it will be sufficient, and the Verdict must be for the Crown. And therefore, where divers Overt-Acts are laid, and the Indictment in Point of Form happeneth to be faulty with regard to some of them, the Court will not quash it for those Defects. Because that would deprive the Crown of the Opportunity of proving the Overt-Acts that are well laid.

SECT. 2.

SECT. 2. I said in the last Section, that in the Case of the King, the Statute of Treasons hath with great Propriety retained the Rule, *Voluntas pro facto*. The Principle upon which this is founded is too obvious to need much Enlargement. The King is considered as the Head of the Body Politick, and the Members of that Body are considered as united and kept together by a political Union with him

him and with each other. His Life cannot, in the ordinary Course of Things, be taken away by treasonable Practices without involving a whole Nation in Blood and Confusion. Consequently every Stroke levelled at his Person is, in the ordinary Course of Things, levelled at the publick Tranquillity. The Law therefore tendereth the Safety of the King with an anxious, and if I may use the Expression, with a Concern bordering upon Jealousy. It considereth the wicked Imaginations of the Heart in the same Degree of Guilt as if carried into actual Execution, from the Moment *Measures appear to have been taken to render them effectual.* And therefore, if Conspirators meet and consult how to kill the King, though they do not then fall upon any Scheme for that Purpose, this is an Overt-Act of compassing his Death; and so are all Means made use of, be it Advice, Persuasion or Command, to incite or encourage others to commit the Fact, or to join in the Attempt. And every Person who but assenteth to any Overtures for that Purpose will be involved in the same Guilt.

AND if a Person be but once present at a Consultation for such Purposes and concealeth it, *having had a previous Notice of the Design of the Meeting,* this is an Evidence proper to be left to a Jury of such Assent, though the Party say or do Nothing at such Consultation. The Law is the same if he is Present at more than one such Consultation, and doth not Dissent or make a Discovery. But in the Case of once falling into the Company of Conspirators, if the Party met them accidentally or upon some indifferent Occasion, bare Concealment without *Express Assent* will be but Misprision of Treason. The Law was formerly more strict in this Respect; *Si ad tempus dissimulaverit vel subticuerit, quasi consentiens & assentiens, erit seductor Domini Regis manifestus.*

1. Hale 119.
Keil. 17.

Keil 17. 21.
4. St. Tri.
680.

Bract. de coron. c. 3. S. 1.

SECT. 3. THE Care the Law hath taken for the personal Safety of the King is not confined to Actions or Attempts of the more flagitious Kind, to Assassination or Poison, or other Attempts directly and immediately aiming at his Life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. And therefore the entering into Measures for de-

SECT. 3.

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SECT. 4.

Dr. Story's
Case.

SECT. 4. OFFENCES which are not so personal as those already mentioned, have been with great Propriety brought within the same Rule; as having a Tendency, though not so immediate, to the same fatal End. And therefore the entering into Measures in Concert with Foreigners or others in order to an Invasion of the Kingdom, or going into a foreign Country, or even purposing to go thither to that End *and taking any Steps in Order thereto*, these Offences are Overt-Acts of Compassing the King's Death.

4. St. Tri.

LORD *Preston* and two other Gentlemen had procured a Smack to transport them to *France*, but were stopped before they got out of the River, and their Papers seized. Among the Papers was found a Scheme intended to be laid before the *French* King or his Ministers for invading the Kingdom in Favour of the late King *James* the Second; with many Letters, Notes and *Memoranda*, all tending to the same Purpose. Lord *Preston* upon his Trial insisted among other Matters, that *no Overt-Act was proved upon him in Middlesex*, where all the Overt-Acts were laid, for he was taken with the Papers in the County of *Kent*. But the Court told the Jury, that if upon the whole Evidence they did believe that his Lordship had an Intention of going into *France* and to carry those Papers thither *for the Purposes charged in the Indictment*, his taking Boat at *Surry* Stairs, which are in *Middlesex*, in order to go on board the Smack was a sufficient Overt-Act in *Middlesex*. Every Step taken for those Purposes was an Overt-Act. Chief Justice *Holt*, Chief Justice *Polléxfen*, and Chief Baron *Atkins* delivered their Opinions *seriatim* to this Purpose, all the other Judges present concurring.

THE Offence of inciting Foreigners to invade the Kingdom is a Treason of signal Enormity. In the lowest Estimation of Things and in all possible Events, it is an Attempt on the Part of the Offender to render his Country the

the Seat of Blood and Desolation. And yet, unless the Powers so incited happen to be actually at War with us at the Time of such Incitement, the Offence will not fall within any Branch of the Statute of Treasons, except that of compassing the King's Death. And therefore since it hath a manifest Tendency to endanger the Person of the King, it hath in strict Conformity to the Statute, and to every Principle of substantial political Justice, been brought within that Species of Treason of compassing the King's Death. *Ne quid detrimenti Respublica capiat.*

C H A P.
I.

SECT. 5. LORD Coke seemeth to have been of Opinion that an Offence falling under one Branch of the Statute cannot be deemed an Overt-Act of a different Species of Treason. I believe Lord Hale did once fall into the same Opinion; for in his Summary speaking of Conspiracy to levy War, he saith, it is no Overt-Act of compassing the King's Death, *because it relateth to a distinct Treason.* But Hale altered his Opinion. And it is every Day's Experience that many Offences falling directly and by Name under other Branches of the Statute, may be brought within this of compassing the King's Death. * Levying War is an Overt-Act of compassing; and under the Limitations stated in the next Chapter, *Conspiring* to levy War likewise is an Overt-Act within this Branch. And so is a treasonable Correspondence with the Enemy, though it falleth more naturally within the Clause of *Adhering to the King's Enemies.* And in the Case of *Patrick Harding*, the raising Men with Intent to dethrone the King, and sending them abroad to join for that Purpose with the Forces of *France* then at open War with us, which had the Overt-Act been properly laid would have fallen within the Clause of *Adhering*, was ruled to be an Overt-Act of compassing the King's Death. And in Lord *Preston's* Case before cited, he and the other Gentlemen were indicted upon both Branches of the Statute, *Compassing the Death and Adhering.* And the composing, procuring, and secreting the treasonable Papers, their taking Boat to go on Board the Smack, and carrying the Papers with them in order to be

SECT. 5.
3. Inst. 14.
Sum. 13.

1. Hale 119.
--- 123.

2. Vent. 315.

* See Stat. 29. H. 6. *Jack Cade's* Rebellion was deemed an Overt-Act of compassing. See Chap. 2. S. 3. 6. 8. touching these Matters.

CH A P. made use of in *France* for the treasonable Purposes charged
I. in the Indictment, these Facts were all laid as Overt-
Acts of *both* Species of Treason.

SECT. 6. SECT. 6. How far Words or Writings of a seditious Nature may be considered as Overt-Acts within this Branch of the Statute hath been the Subject of much Debate. In Mr. *Sidney's* Case it was said, *Scribere est agere*. This is undoubtedly true under proper Limitations, but it was not applicable to his Case. Writing being a deliberate Act and capable of satisfactory Proof certainly may, under some Circumstances *with Publication* be an Overt-Act of Treason. And I freely admit that had the Papers found in Mr. *Sidney's* Closet been plainly relative to the other treasonable Practices *charged in the Indictment*, they might have been read in Evidence against him, though not published.

THE Papers found in Lord *Preston's* Custody, those found where Mr. *Lyster* had lodged them, the intercepted Letters of Doctor * *Hensley*, were all read in Evidence as Overt-Acts of the Treason respectively charged on them. And *William Greg's* intercepted Letter might in like Manner have been read in Evidence, if he had put himself upon his Trial. For those Papers and Letters were written in Prosecution of certain determinate Purposes which were all treasonable and then in Contemplation of the Offenders, and were plainly connected with them. But Papers not capable of such Connection while they remain in the Hands of the Author unpublished as Mr. *Sidney's* did, will not make a Man a Traitor. Lord *Hale* in the Place last cited mentioneth two Circumstances as concurring to make Words reduced to Writing Overt-Acts of compassing the King's Death, *that they be published, and that they import such Compassing*.

Cro. Car.
125.

TRUE it is that in *Peacham's* Case a MS. Sermon in which were some treasonable Passages found in his Study, never for aught appeareth preached or published or intended to be so, was thought to bring him within this Branch of the Statute; and accordingly he was found Guilty, *but*

* See the Cases of *Hensley* and *Greg*, in the next Chap. §. 8.

not executed. For whatever Rule the Court of King's Bench, where he was tried, might lay down, "Many of the Judges, saith *Croke*, were of Opinion that it was not High Treason." This Case therefore weigheth very little; and no great Regard hath been paid to it ever since.

AND perhaps still less Regard will be paid to it if it be considered that the King, who appeareth to have had the Success of the Prosecution much at Heart, and took a Part in it unbecoming the Majesty of the Crown, condescended to instruct his Attorney-General with regard to the proper Measures to be taken in the Examination of the Defendant. That the Attorney at his Majesty's Command submitted to the Drudgery of founding the Opinions of the Judges upon the Point of Law, before it was thought adviseable to risque it at an open Trial. That the Judges were to be sifted separately and *soon, before they could have an Opportunity of conferring together.* And that for this Purpose four Gentlemen of the Profession in the Service of the Crown were immediately dispatched, one to each of the Judges; Mr. Attorney himself undertaking to Practice upon the Chief Justice, of whom some Doubt was then entertained.

James the 1st.

Bacon.

Coke.

Is it possible that a Gentleman of *Bacon's* great Talents could submit to a Service so much below his Rank and Character? But he did submit to it, and acquitted himself notably in it.

AVARICE, I think, was not his ruling Passion. But whenever a false Ambition ever restless and craving, overheated in the Pursuit of the Honours which the Crown alone can confer, happeneth to stimulate an Heart otherwise formed for great and noble Pursuits, it hath frequently betrayed it into Measures full as mean as Avarice itself could have suggested to the wretched Animals who live and die under her Dominion. For these Passions, however they may seem to be at Variance, have ordinarily produced the same Effects. Both degrade the Man, both contract his Views into the *little* Point of Self-Interest, and equally steel the Heart against the Rebukes of Conscience, or the Sense of true Honour.

BACON having undertaken the Service, informeth his Majesty in a Letter addressed to him that with Regard to

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Three of the Judges whom he nameth, he had small Doubt of their Concurrence; "Neither, saith he, am I wholly out of Hope, that my Lord Coke himself, when I have in SOME DARK MANNER put him in Doubt that he shall be left alone, will not continue singular." These are plain naked Facts, they need no Comment.* Every Reader will make his own Reflections upon them. I have but One to make in this Place. This Method of forestalling the Judgment of a Court in a Case of Blood then depending, at a Time too when the Judges were removable at the Pleasure of the Crown, doth no Honour to the Memory of the Persons concerned in a Transaction so insidious and unconstitutional; and at the same Time greatly weakeneth the Authority of the Judgment.

SECT. 7.

SECT. 7. As to meer Words supposed to be Treasonable, they differ widely from Writings in Point of real Malignity and proper Evidence. They are often the Effect of meer Heat of Blood, which in some Natures otherwise well disposed, carrieth the Man beyond the Bounds of Decency or Prudence. They are always liable to great Misconstruction from the Ignorance or Inattention of the Hearers, and too often from a Motive truly Criminal. And therefore I choose to adhere to the Rule which hath been laid down on more Occasions than one since the Revolution, that loose Words *not relative to any Act or Design* are not Overt-Acts of Treason. But Words of Advice or Persuasion, and all Consultations for the traiterous Purposes treated of in this Chapter are certainly so. They are uttered in Contemplation of some traiterous Purpose actually on Foot or intended, and *in Prosecution* of it.

4. Tri. 581.
645.

1. Hale 111.
— 115. 323.
3. Inf. 14.

LORD Chief Justice Hale was of Opinion that bare Words are not an Overt-Act of Treason, Coke was of the same Opinion. Hale hath treated the Subject pretty much at large, and I shall not repeat his Argument. But I must say

* See Bacon's Letters in the 4th Edition of his Works, 1740, Lett. 111. 112. 114. 116. 117. Others of his Letters shew that the same Kind of Intercourse was kept up between the King and his Attorney General with regard to many Cases then depending in Judgment, in which the King was pleased to take a Part, or thought his Prerogative concerned. Particularly in the Case of one Owen executed for treasonable Words, in that of Mr. Oliver St. John touching the Benevolence, in the Dispute between the Courts of King's Bench and Chancery in the Case of the *Præmunire*, and in the Proceedings against the earl and countess of Somerset.

say that I think his Reasons founded on temporary Acts or Acts since repealed, which make speaking the Words therein set forth *Felony or Misdemeanor* are unanswerable. For if those Words, seditious to the last Degree, had been deemed Overt-Acts within the Statute of Treasons, the Legislature could not with any Sort of Consistency have treated them as Felony or Misdemeanor.*

THE same Use may be made of the Acts passed in the Time of the late Queen for the Security of her Majesty's Person and Government, and of the Succession to the Crown in the Protestant Line. These Acts provide, that every Person who should maliciously, advisedly and directly by *Writing or Printing* affirm, that the Queen was not the rightful Queen of these Realms, or that the Pretender had any Right or Title to the Crown, or that any other Person had any Right or Title otherwise than according to the Acts passed since the Revolution for settling the Succession, or that the Legislature hath not sufficient Authority to make Laws for limiting the Succession, shall be guilty of High Treason and suffer as a Traitor. And then Enact, that if any Person shall *maliciously and directly by preaching, teaching, or advised Speaking* declare and maintain the same, he shall incur the Penalties of a *Præmure*.

4. Annæ 8.

6. Annæ 7.

I will make a short Observation or two on these Acts.

1st, THE Positions condemned by them had as direct a Tendency to involve these Nations in the Miseries of an intestine War, to incite her Majesty's Subjects to withdraw their Allegiance from her, and to deprive her of her Crown and Royal Dignity, as any General Doctrine, any Declaration *not relative to Actions or Designs*, could possibly have. And yet in the Case of bare Words, Positions of this dangerous Tendency, though maintained *maliciously, advisedly, and directly*, and even in the Solemnities of *Preaching and Teaching*, are not considered as Overt-Acts of Treason.

2^{dly}, IN no Case can a Man be *argued* into the Penalties of the Acts by Inferences and Conclusions drawn from

* The like use hath been made of temporary Statutes which make Words in certain Cases Treason. But I do not build upon them, I rely on those which make Words *Felony or Misdemeanor*.

what

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I.

what he hath affirmed. The criminal Position must be *directly* maintained, to bring him within the Compass of these Acts.

3^{dly}, NOR will every rash, hasty, or unguarded Expression, owing perhaps to natural Warmth, or thrown out in the Heat of Disputation, render any Person Criminal within these Acts; the criminal Doctrine must be maintained *maliciously and advisedly*.

SUCH Caution did the Legislature use in framing these Statutes made in the Zeal of the Times. A most laudable Zeal it was, for Purposes of no less Importance than the Security of her then Majesty's Person and Government, and of the Succession to the Crown in his present Majesty's Royal House. A Caution formerly used in similar Cases, and not unworthy of Imitation in framing future Acts of the like Kind, if any such shall be thought necessary, and which may serve as a faithful Monitor in the Conduct of Prosecutions for Words or Writings supposed to be treasonable, but not relative to any treasonable Measure then on Foot or intended to be taken.

SECT. 8.

SECT. 8. THE Rule I cited in the last Section from the State Trials is in my Opinion very properly guarded, being confined to Words, *not relative to any Act or Design*. For Words connected with Facts, or expressive of the Intention of the Speaker, may under some Circumstances bring him within the Statute of Treason. *Crobagan* being beyond Sea said, "I will kill the King of England, if I can come at him," and the Indictment after setting forth the Words, charged that *he came into England for that Purpose*.

Keil 13.
1. Hale 116.
Cro. Car.
332.

IN this Case the Words though laid in the Indictment as one of the Overt-Acts, could not be so properly deemed an Overt-Act of Treason, as an Evidence against the Man out of his own Mouth. *QUO ANIMO* *he came into England*. The traiterous Intention proved by his Words, converted an Action innocent in itself, into an Overt-Act of Treason.

4. St. Tri.
645.

Keil. 13.

LORD Chief Justice *Keiling* hath cited this Case from *Croke* very imperfectly, and hath drawn a Conclusion from it which if properly stated it would not have borne. He
faith

saith it was resolved “ that in Case a Man be indicted
 “ only for Words, that is not High Treason. But if a
 “ Man be indicted for compassing the King’s Death,
 “ there the Words may be laid as an Overt-Act to prove
 “ that he compassed the Death of the King, as it
 “ was in the Case of *Crobagan*; who being beyond Sea,
 “ spoke these Words, *I will kill the King if I can come*
 “ *at him*: and afterwards he came into *England* and was
 “ taken and indicted for compassing the King’s Death;
 “ and those Words laid as an Overt-Act and proved,
 “ and he had Judgment of High Treason.”

FROM the Case *thus cited* and the Rule that is ground-
 ed on it, a Reader would be induced to conclude that the
 Words were the *only* Overt-Act laid, which is far from
 being the Truth of the Case. ’Tis true, the Words
 were laid as an Overt-Act, but they were not the *only*
 Overt-Act laid; for the Indictment further charged that
 the Man came into *England for the Purpose of Killing the*
King. This Material Part of the Case is entirely drop-
 ped: and consequently this Case, thus partially stated, doth
 not establish the Doctrine in the Latitude there laid down.

THE Author in the same Page endeavoureth to put
 Writings and Words upon one and the same Foot,
 “ Words, saith he, set down in Writing are an Overt-
 “ Act to prove the Compassing the King’s Death, and
 “ Words *spoken* are the same thing, *if they be proved*.
 “ And Words are the natural Way for a Man whereby
 “ to express the Imaginations of the Heart.”

HIS Lordship reasoneth in this Passage as if he con-
 sidered the Overt-Acts required by the Statute, meer-
 ly as *Matters of Evidence*, tending to discover the Ima-
 ginations of the Heart. Overt-Acts undoubtedly do dis-
 cover the Man’s Intentions: but I conceive they are not
 to be considered meerly as Evidence, but as the *Means*
made use of to Effectuate the Purposes of the Heart.
 With regard to Homicide, while the Rule *Voluntas*
pro facto prevailed, the Overt-Acts of Compassing
 were so considered. In the Cases cited by *Coke* there
 were plain flagitious Attempts upon the Lives of the
 Parties marked out for Destruction. And though in
 the Case of the King Overt-Acts of less Malignity, and
 having a more remote Tendency to his Destruction, are
 with

CH A P.
I.

with great Propriety deemed treasonable; yet still they are considered as *Means to effectuate*, not barely as *Evidence* of the treasonable Purpose. Upon this Principle Words of Advice or Incouragement, and above all, Consultations for destroying the King, very properly come under the Notion of *Means made use of* for that Purpose. But loose Words not relative to Facts are at the worst, no more than bare Indications of the Malignity of the Heart.

KEILING in the Place last cited saith, he seeth no Difference between Words *reduced in Writing* and Words *spoken*. But as I have already said, the Difference appeareth to me to be very great, and it lieth here. Seditious Writings are permanent Things, and if published they scatter the Poison far and wide. They are Acts of Deliberation, capable of satisfactory Proof, and not ordinarily liable to Misconstruction; at least they are submitted to the Judgment of the Court, naked and undisguised as they came out of the Author's Hand's. Words are transient and fleeting as the Wind, the Poison they scatter is at the worst confined to the narrow Circle of a few Hearers. They are frequently the Effect of a sudden Transport, easily misunderstood, and often misreported.

Lord Chief
Jus. Holt.

THE learned Publisher of *Keiling's Reports* in his Preface putteth the Reader in Mind of two *Quæres* inserted in their proper Places in the Margin of the Book, "Which," saith he, "may be fit to be considered by the Learned." One of them standeth against this very Passage, "yet *Quære*, because of the different Opinions. But Words *may explain the Meaning of an Act.*"

The Learned Judge seemeth to have intimated his own Opinion in this cautious Manner rather from the Regard he had to the Memory of his Predecessor, and by Reason of the Diversity of Opinions upon the Point, than from any Doubt he himself entertained about it. For the Rule I have already mentioned touching Words *not relative to Actions or Designs*, is his own: He laid it down with the Concurrence of the Court, in both the Cases to which I have referred. And it exactly falleth in with the marginal Note I have just cited, that "Words may explain the Meaning of an Act," and likewise with *Crobian's Case* as reported by *Croke* and cited by *Hale*.

THIS

THIS Rule differeth in some measure from the Resolution in *Pyne's Case*. As it is restrained to Words not relative to Actions or Designs; but under that Limitation it perfectly agreeth with it. It is agreeable to the Spirit and Meaning of the Statute of Queen *Mary*, which among other Mischiefs arising from the Multiplicity of Treasons mentioneth this, "that many Persons had suffered shameful Death for *Words only*, without any other Opinion, Fact, or Deed."

Cro. Car.

125.

1. Mar. Sess.

1. C. 1.

And it is founded in Reason, Equity, and sound Policy.

I said at the Beginning of this Section that Lord *Coke* was of Opinion that bare Words are not an Overt-Act of Treason. This Opinion he foundeth *singly* upon the Statute of Treasons; for he thought that at Common-Law, Words alone might be an Overt-Act of Compassing the King's Death. And *Bracton* and the other Authors, who wrote before the Statute, are cited in support of this Opinion. *Bracton* and *Britton* are cited to the same Purpose by *Stanford*.

3. Inst. 5.

f. 2. b.

NONE of the Authors either of the learned Judges hath cited do in expresse Terms maintain this Doctrine, nor can I collect from what they have said that they at all favoured it. The Word *Machinatus*, used by *Bracton* and *Fleta*, in itself importeth nothing like it. And connected as it is with the other Words *Ausu temerario Machinatus*, it importeth nothing less than something done or attempted against the King's Life.

THE Word *Compasser* made use of by *Britton* and the *Mirror* in the Passages cited by *Coke* proveth Nothing: it can prove nothing in a Question which turneth singly on the true Sense and full Extent of the Word itself.

THE Words *Prælocutus fuit Mortem*, &c. used by *Bracton* and *Fleta* in setting forth the Substance of an Appeal of Treason, and the Words *Purparler tiel mort* used by *Britton* for the same Purpose, do in Sound come much nearer to the Point. But Sounds will go a very little way towards fixing the meaning of an Author, unless the Sense and Connection of his Words be attended to. *Bracton* and *Fleta* give us but the Substance of the Appeal, and that very shortly. *Britton* is more full, *Cy face l' encusor son Appeal*
en

CH A P. *en cest Manner, I. que cy est, Appellat P. que illouques est, de ceo, que come il fust en tiel certain Lieu, en certain tiel Jour, tiel An, la oya mesme cestuy I. purparler tiel Mort ou tiel Treason* * [*parenter cestuy P. & un auter tiel par Nofme, & par tiels Aliances. Et que cestuy P. issint le fist & issint purparla felonisment come Felon, & traïtorousment come Traytor, cestuy I. est prist a prover par son Corps.*] This Precedent plainly importeth a Meeting of the Conspirators and a Consultation between them for the traïterous Purposes therein mentioned. The Words *purparler parenter cestuy P. & un auter & par tiel Aliances* can mean nothing less. This Passage therefore proveth Nothing with Regard to bare Words not relative to Actions; since a Consultation for taking away the King's Life undoubtedly was an Overt-Act at the Common-Law, and is so under the Statute.

THE Citations from *Bracton* and *Fleta* will be found to prove as little, if the Words *Prælocutus fuit Mortem* import a Consultation with others to that Purpose. And that they do so, appeareth highly probable from one of the Pleas which *Fleta* putteth into the Defendant's Mouth, *ad hoc, quod Accusans dicit quod Prælocutio fuit in præsentia talium, respondere poterit, quod nunquam cum prædictis talibus Colloquium habuit.* However since all those Authors short and obscure as they are, professedly treat of the same Matter, if *Bracton* and *Fleta* may be explained by *Britton* who did not write long after them, these Passages prove nothing to the Point for which they have been cited.

THE Precedent Lord *Coke* fetcheth from the Days of King *Edmund* will receive the same Answer. For it chargeth that the Conspirators, naming them *ET AU-TERS*, met and consulted by what Means to kill or imprison the King, and engaged to each other to keep their Treason secret; and to furnish each of them to the utmost of his Power the Means for effecting it.

It may be thought I have taken up too much of the Reader's Time in examining this Opinion of Lord *Coke*, because as I said before, he admitteth that *since the Statute*, Words alone will not make a Man a Traitor. "There must, saith he, be an Overt-Deed; but Words without

* All the Words between the Hooks are omitted by *Coke*.

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CHAP. I.

“ an Overt-Deed are to be punished in another Degree
“ as an high Misprision.” But if it be admitted that
bare Words not relative to Actions did at Common-Law
amount to an Overt-Deed, I doubt the Words *open Deed*
in the Statute on which this learned Author relieth have
not altered the Case; since the single Question is, what
doth or doth not amount to an open Deed. All the
Words descriptive of the Offence “ If a Man shall Com-
“ pass and Imagine and thereof be attainted of open
“ Deed,” are plainly borrowed from the Common-Law:
and therefore must bear the same Construction they did
at Common-Law; unless there be any Thing in the
Statute which will necessarily lead us to another.

THIS hath been urged with some Advantage by a
good modern Writer on the Crown Law, the best we
have except *Hale*, against his Lordship's Construction
of the Statute. It is I confess a good Argument *ad Ho-*
minem, but it cannot be carried farther. However, lest
it should I thought it would be Time not wholly mispent
to shew that the Doctrine his Lordship hath advanced
upon the Foot of Common-Law, is not supported by
any of the Authorities to which he hath appealed.

I have considered the Question touching Words and
Writings supposed to be treasonable the more largely,
not only because of the Diversity of Opinions upon it;
but likewise for the great Importance of the Point, and
the extreme Danger of multiplying Treasons upon slight
Occasions.

I cannot conclude this Chapter without putting the
Reader in mind of a fine Passage I borrow from the Ba-
ron *de Montesquieu*, worthy the Attention of all Persons
concerned in the framing of penal Laws or putting them
in Execution, “ *Sylla*, saith that excellent Writer, who
“ confounded Tyranny, Anarchy, and Liberty, made the
“ *Cornelian* Laws. He seemed to have contrived Re-
“ gulations meerly with a View to create Crimes. Thus
“ distinguishing an infinite Number of Actions by the
“ Name of Murder, he found Murderers in all Parts.
“ And by a Practice *but too much followed* he laid Snares,
“ sowed Thorns, and opened Precipices, wheresoever
“ the Citizens set their Feet.

CHAP.

Of levying War and adhering to the King's Enemies.

LORD Chief Justice *Hale* speaking of such unlawful Assemblies as may amount to a levying of War within the 25. *E.* 3, taketh a Difference between those Insurrections which have carried the Appearance of an Army formed under Leaders, and provided with military Weapons and with Drums, Colours, &c. and those other disorderly tumultuous Assemblies which have been drawn together and conducted to Purposes manifestly unlawful, but without any of the ordinary Shew and Apparatus of War before mentioned.

1. Hale 131.
141. 150. to
153.

I do not think any great Stress can be laid on that Distinction. It is true that in Case of levying War, the Indictments generally charge that the Defendants were armed and arrayed in a warlike Manner; and where the Case would admit of it, the other Circumstances of Swords, Guns, Drums, Colours, &c. have been added. But I think the Merits of the Case have never turned singly on any of those Circumstances.

IN the Cases of *Damaree* and *Purchase* which are the last printed Cases that have come in Judgment on the Point of constructive levying War, there was nothing given in Evidence of the usual Pageantry of War, no military Weapons, no Banners or Drums, nor any regular Consultation previous to the Rising. And yet the Want of those Circumstances weighed nothing with the Court, though the Prisoners Council insisted much on that Matter. The Number of the Insurgents supplied the Want of military Weapons; and they were provided with Axes, Crows, and other Tools of the like Nature, proper for the Mischief they intended to effect.

v. Sect. 7.

— *Furor Arma ministrat.*

SECT. I. **SECT. I.** THE true Criterion therefore in all these Cases is, *Quo Animo* did the Parties assemble. For if the Assembly be

be upon Account of some *private* Quarrel, or to take Revenge of *particular* Persons, the Statute of Treasons hath already determined that Point in Favour of the Subject.

“ If, saith the Statute, any Man ride armed *openly* [So the Word *Descouvert* ought to have been rendered] or secretly with Men of Arms against any other to slay or to rob him, or to take and keep him ’till he make Fine for his Deliverance, it is not the Mind of the King nor his Council that in such Case it shall be judged Treason; but it shall be judged Felony or Trespass according to the Laws of the Land of *old Times used* and according as the Case requireth.”

Then immediately followeth another Clause which reacheth to the End of the Statute; and provideth that, if in such Case or *other like* the Offence had thentofore been adjudged Treason, whereby the Lands of the Offenders had come to the Crown as forfeit; the Lords of the Fee should notwithstanding have the Escheat of such Lands, saving to the Crown the Year, Day, and Wast.

I will make a short Observation or two on these Clauses:

1st, THE first Clause is evidently declaratory of the Common-Law, it shall be adjudged Felony or Trespass *according to the Law of the Land of old Time used*. The 2^d hath a Retrospect to some late Judgments in which the Common-Law had not taken Place; and giveth a speedy and effectual Remedy to Lords of the Fee who had suffered by those Judgments.

2^{dly}, THE Words of the first Clause descriptive of the Offence, “ if any Man ride armed openly or secretly with Men of Arms” did in the Language of those Times, mean nothing less than the assembling Bodies of Men, Friends, Tenants or Dependants, armed and arrayed in a warlike Manner in order to effect some Purpose or other by Dint of Numbers and superior Strength. And yet those Assemblies so armed and arrayed, if drawn together for Purposes of a private Nature, were not deemed treasonable.

3^{dly}, THOUGH the Statute mentioneth only the Cases of assembling to kill, rob or imprison, yet these, put as they are by Way of Example only, will not exclude others which may be brought within the same Rule. For the retrospective Clause provideth that “ if in such Case *or other*”

CH A P. "like it hath been adjudged" — what are the other like
II.

1. Hale 80.
135. 149.
260.

Cases? all Cases of the like private Nature are, I apprehend, within the Reason and Equity of the Act. The Case of the Earls of *Gloucester* and *Hereford*, and many other Cases cited by *Hale*, some before the Statute of Treasons, and others after it, those Assemblies though attended many of them with Bloodshed and with the ordinary Apparatus of War, were not held to be treasonable Assemblies. For they were not in Construction of Law, raised against the King or his royal Majesty, but for Purposes of a private personal Nature.

SECT. 2.

SECT. 2. UPON the same Principle and within the Reason and Equity of the Statute, Risings to maintain a *private* Claim of Right, or to destroy *particular* Inclosures; or to remove Nuisances which affected or were thought to affect in Point of Interest the Parties assembled for those Purposes, or to break Prisons in order to release *particular* Persons without any other Circumstance of Aggravation, have not been held to amount to levying War within the Statute.

1. Hale* 143.
to * 146.

AND upon the same Principle and within the same Equity of the Statute, I think it was very rightly held by five of the Judges, that a Rising of the Weavers in and about *London* to destroy all Engine-Looms, a Machine which enabled those of the Trade who made use of it to undersell those who had it not, did not amount to levying War within the Statute; though great Outrages were committed on that Occasion, not only in *London* but in the adjacent Counties, and the Magistrates and Peace-Officers were resisted and affronted.

FOR those Judges considered the whole Affair merely as a *private Quarrel between Men of the same Trade about the Use of a particular Engine, which those concerned in the Rising thought detrimental to them.* Five of the Judges indeed were of a different Opinion. But the Attorney-General thought proper to proceed against the Defendants as for a Riot only.

SECT. 3.

SECT. 3. BUT every Insurrection which in Judgment of Law is intended against the Person of the King be it to dethrone

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CHAP.

II.

dethrone or imprison him, or to oblige him to alter his Measures of Government, or to remove evil Councillors from about him, these Risings all amount to levying War within the Statute; whether attended with the Pomp and Circumstances of open War or no. And every Conspiracy to levy War for these Purposes, though not Treason within the Clause of levying War, is yet an Overt-Act within the* other Clause of compassing the King's Death. For those Purposes cannot be effected by Numbers and open Force without manifest Danger to his Person.

4. St. Tri.
613. 614.

SECT. 4. INSURRECTIONS in order to throw down all Inclosures, to alter the established Law or change Religion, to inhance the Price of all Labour or to open all Prisons, all Risings in order to effect these Innovations of a *publick and general Concern by an armed Force*, are in Construction of Law high Treason, within the Clause of levying War. For though they are not levelled at the Person of the King, they are against *his royal Majesty*. And besides, they have a direct Tendency to dissolve all the Bonds of Society, and to destroy all Property and all Government too, by Numbers and an armed Force. Insurrections likewise for redressing *national Grievances*, or for the Expulsion of Foreigners in general, or indeed of any single Nation living here under the Protection of the King, or for the Reformation of real or imaginary Evils of a *publick Nature and in which the Insurgents have no special Interest*, Risings to effect these Ends by Force and Numbers, are by Construction of Law within the Clause of levying war. For they are levelled at the King's Crown and royal Dignity.

SECT. 4.

SECT. 5. IT was adjudged in the 16. Car. 1. a Sea-son of great Agitation, that going to *Lambeth-House* in a warlike Manner to surprize the Archbishop, who was a Privy-Councillor, it being *with Drums* and a Multitude to the Number of 300, was Treason.

SECT. 5.
1. Hale 141.
152. Cro.
Car. 583.
Benstead's
Case.

THIS is a very imperfect Account of an Insurrection which hath found a Place in the best Histories of that Time

* The Summary p. 13. layeth down a different Rule and so doth 3. Inst. 14. But the Law is mistaken in those Books.

CHAP. The Tumult happened on *Monday* the 11th of *May* 1640
 II. about Midnight. On the *Thursday* following the special
 Laud's Diary. Commission under which the Judges sat was opened and
 proceeded upon; and *Benstead* a Ring-leader in the Tu-
 Rushworth. mult was convicted, and within a very few Days after-
 wards executed.

It is not easy from the short Note of the Case given by the Reporters to collect the true Grounds of this Resolution. But the History of the Times will enable us to form a probable Conjecture concerning them.

ON the fifth of *May* the Parliament was dissolved to the general Dissatisfaction of the Nation. And, which greatly increased the ill Humour of the People, the Convocation was by a new Commission impowered to continue sitting, notwithstanding the Dissolution of the Parliament. *And the Blame and Odium of both these unpopular Measures were laid upon the Archbishop.*

ON *Saturday* the ninth of that Month a Paper was posted up at the *Exchange* exhorting the Apprentices to rise and sack the Archbishop's House upon the *Monday* following. And accordingly on that very Day an Attempt was made upon *Lambeth-House* by a Rabble of some Thousands; with open Profession and Protestation, *that they would tear the Archbishop in Pieces.*

It were to be wished that the full Import of the Libel posted at the *Exchange*, in Consequence of which the Attempt was made, had been set out: and also that we were informed what was the Cry among the Rabble at the Time of the Attempt, more than that they would tear the Archbishop in Pieces. These Circumstances, could we come at them, would probably let us into the true Reason and Motives for the Rising, and consequently into the Reason and Grounds of the Opinion of the Judges. For if it did appear by the Libel or by the Cry of the Rabble at *Lambeth House*, that the Attempt was made on Account of Measures the King had taken or was then taking at the *Insurrection as they imagined of the Archbishop*; that the Rabble had deliberately and upon a publick Invitation attempted by Numbers and open Force, to take a severe Revenge upon the Privy-Councillor, for the Measures the Sovereign had taken or was pursuing; if this may be supposed to be the Case,

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CASE, I think the Supposition is not very foreign, the CHAP. II.
 Grounds and Reasons of the Resolution would in my
 Opinion be sufficiently explained, without taking that lit-
 tle trifling Circumstance of the Drum into the Case.
 Upon such a Supposition, the Case came within the Rea-
 son of *Talbot's Case* 17. R. 2, cited by *Hale*. And I think too within the Rules laid down in the two preced-
 ing Sections. But without the Help of some such Sup-
 position, I see nothing in the Case as stated by the Re-
 port, which can amount to High Treason.

SECT. 6. BUT a bare Conspiracy for effecting a SECT. 6.
 Rising for the Purposes mentioned in the two preceding
 Sections and in the next, is not an Overt-Act of com-
 passing the King's Death. Nor will it come under any
 Species of Treason within the 25. E. 3. *unless the Rising*
be effected. And in that Case the Conspirators as well as
 the Actors will all be equally guilty. For in High Treas-
 on of all Kinds, all the *Participes Criminis* are Principals.

It must be admitted that Conspiracies for these Pur-
 poses have been adjudged Treason. But those Judgments
 were founded, on the temporary Act of 13. Eliz.
 which made compassing to levy War, declared by
 printing, writing, or advised speaking, high Treason
during the Life of the Queen.

THERE was an Act in the 13. Car. 2. to the same Pur-
 pose on which some Prosecutions were founded; but that
 Act expired with the Death of the King.

SECT. 7. THE Cases of *Damaree* and *Purchase* for SECT. 7.
 destroying the Meeting-Houses of Protestant Dissenters,
 being the last in *Print* that have come in Judgment up-
 on the Doctrine of constructive levying War; and hav-
 ing been ruled upon Consideration of former Precedents,
 I will state them somewhat largely from the printed Trials.

THE Indictments charged that the Prisoners withdraw-
 ing their Allegiance &c. and conspiring and intending to
 disturb the Peace and publick Tranquillity of the King-
 dom did traiterously compass, imagine, and intend to le-
 vy and raise War, Rebellion, and Insurrection against the
 Queen within the Kingdom: and that in order to com-

CHAP. II. pleat and effect those their traiterous Intentions and Imaginations, they on the Day of at with a Multitude of People to the Number of 500 armed and arrayed in a warlike Manner &c. then and there traiterously assembled, did traiterously ordain, prepare, and levy War against the Queen, against the Duty of their Allegiance &c.

It appeared upon the Trial of these Men, which I attended in the Students Gallery † at the *Old Bayly*, that upon the 1. *March* 1709 during Dr. *Sacheverell's* Trial, the Rabble who had attended the Doctor from *Westminster* to his Lodgings in the *Temple*, continued together a short Space in the *King's Bench Walks*, crying among other Cries of the Day, *down with the Presbyterians*

At length it was proposed, by whom it was not known, to pull down the Meeting-Houses, and thereupon the Cry became general, *down with the Meeting-Houses*: and some Thousands immediately moved toward a Meeting-House of Mr. *Burges* a Protestant Dissenting Minister; the Defendant *Damaree*, a Waterman in the Queen's Service and in her Livery and Badge putting himself at the Head of them, and crying *come on Boys, I'll lead you, down with the Meeting-Houses*. They soon demolished Mr. *Burges's* and burnt the Pews, Pulpit, and other Materials in *Lincoln's-Inn Fields*. After they had finished at that Place, they agreed to proceed to the rest of the Meeting-Houses. And hearing that the Guards were coming to disperse them, they agreed for the greater Dispatch to divide into several Bodies, and to attack different Houses at the same Time. And many were that Night in Part demolished and the Materials burnt in the Street.

THE Prisoner *Damaree* put himself at the Head of a Party which drew off from *Lincoln's-Inn Fields* and demolished a Meeting-House in *Drury-Lane*, and burnt the Materials in the Street; still crying they would pull them all down that Night.

† This little Circumstance is mentioned for the Sake of the Students of the Inns of Court; who coming properly habited in Students Gowns have a Right to the Use of the middle Gallery on the Left Hand of the Court during the Trials. The Officers who make Money of the Galleries have sometimes behaved with Rudeness towards the Students; but the Court upon Complaint hath constantly done them Justice.

WHILE

WHILE the Materials of this House were burning, the Prisoner *Purchase* who had not, for aught appeared, been before concerned in the Outrages of that Night, came up to the Fire very drunk; and with his drawn Sword in his Hand, encouraged the Rabble in what they were doing. And incited them to resist the Guards who were then just come to the Fire in order to disperse the Multitude. He likewise assaulted the commanding Officer with his drawn Sword, and struck several of their Horses with the same Weapon. And then advancing towards the Guards cried out to the Rabble behind him, *come on boys, I'll lose my life in the Cause, I will fight the best of them.*

UPON the Trial of *Damaree* the Cases referred to before in Sect. 4. and 5. were cited at the Bar, and all the Judges present were of Opinion that the Prisoner was guilty of the High Treason charged upon him in the Indictment. For here was a rising with an avowed Intention to demolish *all Meeting-Houses in general*; and this Intent they carried into Execution as far as they were able. If the Meeting-Houses of Protestant Dissenters had been erected and supported in Defiance of all Law, a Rising in order to destroy such Houses *in general* would have fallen under the Rule laid down in *Keiling* Keil. 70. with Regard to the demolishing *all Bawdy-Houses*. But since the Meeting-Houses of Protestant Dissenters are by the Toleration-Act taken under the Protection of the Law, the Insurrection in the present Case was to be considered as a publick Declaration by the Rabble against that Act, and an Attempt to render it ineffectual by *Numbers and open Force*.

ACCORDINGLY *Damaree* was found Guilty, and had Judgment of Death as in Cases of high Treason.

BUT he was pardoned and soon afterwards restored to his Badge and Livery, which he wore to the Death of the Queen. Her Majesty's new Advisers did not choose to have the Dawn of their Administration stained with the Blood of one of Doctor *Sacheverell's* ablest Advocates.

WITH regard to the Case of *Purchase*, there was some Diversity of Opinion among the Judges present at his Trial: because it did not appear upon the Evidence that he had any Concern in the original Rising, or was present at the pulling down any of the Houses, or any ways

CHAP.
II.8. St. Tri.
552. to 557.

active in the Outrages of that Night; except his Behaviour at the Bonfire in *Drury-Lane*, whither he came by meer Accident, for aught appeared to the contrary.

THE Jury therefore by the Direction of the Court found a special Verdict to the Effect already mentioned.

UPON this special Verdict, which in Substance took in the whole Transaction on the first of *March*, the Judges unanimously resolved, that for the Reasons mentioned at *Damaree's Trial*, he and the others concerned with him in the demolishing and rifling the Meeting-Houses were guilty of High Treason in levying War against the Queen.

As to the Case of *Purchase*, Chief Justice *Trevor*, Justice *Powell* and Baron *Price* were of Opinion that upon the Facts found, he was not guilty of the Charge in the Indictment. But all the rest of the Judges differed from them. Because the Rabble was traiterously assembled, and in the very Act of levying War when *Purchase* joined them, and encouraged them to proceed, and assaulted the Guards, who were sent to suppress them. All this being done in Defence and Support of Persons engaged in the very Act of Rebellion, involved him in the Guilt of that Treason in which the others were engaged.

THIS Man likewise was pardoned. His Case in Point of Law and of real Guilt too, came far short of *Damaree's*.

SECT. 8.

SECT. 8. THE joining with Rebels in an Act of Rebellion, or with Enemies in Acts of Hostility, will make a Man a Traitor: in the one Case within the Clause of levying War, in the other within that of adhering to the King's Enemies. But if this be done for Fear of Death, and while the Party is under actual Force, and he taketh the first Opportunity that offereth to make his Escape, this Fear and Compulsion will excuse him. It is however incumbent on the Party who maketh Fear and Compulsion his Defence, to shew to the Satisfaction of the Court and Jury, that the Compulsion continued during all the Time he staid with the Rebels or Enemies.

I will not say that he is obliged to account for every Day, Week, or Month. That perhaps would be impossible. And therefore if an original Force be proved, and the

the Prisoner can shew, that he in earnest attempted to escape and was prevented; or that he did get off and was forced back, or that he was narrowly watched, and all Passes guarded; or from other Circumstances, which it is impossible to state with Precision but when proved ought to weigh with a Jury, that an Attempt to escape would have been attended with great Difficulty and Danger; *so that upon the whole He may be presumed to have continued among them against his Will, though not constantly under an actual Force or Fear of immediate Death*, these Circumstances and others of the like Tendency proved to the Satisfaction of the Court and Jury, will be sufficient to excuse him.

BUT an Apprehension though ever so well grounded, of having Houses burnt or Estates wasted or Cattle destroyed,* or of any other Mischief of the like Kind, will not excuse in the Case of joining and marching with Rebels or Enemies.

FURNISHING Rebels or Enemies with Money, Arms, Ammunition or other Necessaries will *Primâ Facie*, make a Man a Traitor. But if Enemies or Rebels come with a superior Force and exact Contributions, or live upon the Country at free Quarter, Submission in these Cases is not criminal. For *flagrante Bello* the *Jus Belli* taketh Place, 'tis the only Law then subsisting. And Submission is a Point of the highest Prudence to prevent a greater publick Evil.

AND the bare sending Money or Provisions (except in the Case just excepted) or sending Intelligence to Rebels or Enemies, which in most Cases is the most effectual Aid that can be given them, will make a Man a Traitor, though the Money or Intelligence should happen to be intercepted. For the Party in sending did all he could; † the Treason was compleat *on his Part though it had not the Effect he intended*.

THE Cases cited in the Margin did not in Truth turn singly upon the Rule here laid down, though I think the

* These Points were so ruled in the Case of *M^r Growther* and of many of the *Scotch* Prisoners on the special Commission in *Surry*, A^o 1746. V. the Report.

† So ruled by the Judges assembled in *January* 1707. in the Case of *William Gregg*. MSS. *Tracy, Dod, Price* and *Denton*. And by the Court of B. R. *Trin.* 31. *Geo.* 2. in the Case of *Dr. Hensley*.

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II.

Sect. 4. 6.

Rule may very well be supported. For *Greg* was indicted for *compassing the Death* of the Queen, and also for *adhering to her Enemies*; and *Hensley's* Indictment was in the same Form, and so was Lord *Preston's* cited in the last Chapter. And the writing and sending the Letters of Intelligence, which in the Cases of *Greg* and *Hensley* were *stopped at the Post-Office*, was laid as an Overt-Act of both the Species of Treason. So that admitting for Argument's Sake, which is by no Means admitted, that it was not an Overt-Act of *Adhering*, since the Letters never came to the Enemy's Hands and consequently no *Aid or Comfort* was actually given, yet the bare writing and sending them to the Post-Office in order to be delivered to the Enemy was undoubtedly an Overt-Act of the other Species of Treason. In *Greg's* Case the Judges did resolve that it was an Overt-Act of both the Species of Treason charged on him. And in *Hensley's* the Court adopted that Opinion and cited it with Approbation.

THOUGH the Cases of these Men were in Substance the same, the Charge against them varied in one Particular. *Greg's* Indictment chargeth that the Letters were sent from the Place where the *Venue* is laid *Into* Parts beyond the Seas (*IN Partes Transmarinas*) to be delivered to the Enemy. *Hensley's*, with much greater Propriety, and agreeable to the Truth of the Case, chargeth that the * Letters were sent from the Place where the *Venue* is laid, *to be delivered in* Parts beyond the Seas to the Enemy. As the Letters never went abroad this was undoubtedly the safer way of laying the Charge.

S E C T. 9.

Salk. 635.

5. St. Tri. 37.

Vaughan's Case.

The same Case.

S E C T. 9. AN Assembly armed and arrayed in a warlike Manner for any treasonable Purpose is *Bellum levatum*, though not *Bellum percussum*. Lifting and marching are sufficient Overt-Acts without coming to a Battle or Action. So cruising on the King's Subjects under a *French Commission*, *France* being then at War with us, was held to be adhering to the King's Enemies, though no other Act of Hostility was laid or proved.

* *Greg* pleaded guilty to his Indictment and was executed. See some Account of him in *Burnet's Memoirs* 2^d Vol. p. 497.

S E C T.

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II.

SECT. 10.

SECT. 10. ATTACKING the King's Forces *in Opposition to his Authority* upon a March or in Quarters is levying war against the King. But if upon a sudden Quarrel, from some Affront given or taken, the Neighbourhood should rise and drive the Forces out of their Quarters, that would be a great Misdemeanor, and if Death should ensue it may be Felony in the Assailants: But it will not be Treason, because there was no Intention against the King's Person or Government.

SECT. 11.

SECT. 11. HOLDING a Castle or Fort against the King or his Forces, if *actual Force be used in order to keep Possession*, is levying War. But a bare Detainer, as suppose by shutting the Gates against the King or his Forces, without any other Force from within, Lord Hale conceiveth will not amount to Treason. But if this be done in *Confederacy with Enemies* or Rebels, that Circumstance will make it Treason; in the one Case under the Clause of adhering to the King's Enemies, in the other under that of levying War. So if a Person having the Custody of a Castle or Fort deliver it up to the Rebels or Enemies, by *Treachery and in Combination with them*, this is high Treason within the Act: in the former Case 'tis levying War, in the latter 'tis adhering to the King's Enemies. But meer Cowardice or Imprudence, though it might subject a Commander in such Case to Death by the martial Law, will not amount to Treason.

1. Hale 146.

296.

1. Hale 168, 169.

SECT. 12.

SECT. 12. STATES in actual Hostility with us, though no War be solemnly declared, are Enemies within the Meaning of the Act. And therefore in an Indictment on the Clause of adhering to the King's Enemies, it is sufficient to aver that the Prince or State adhered to *is an Enemy*, without shewing any War proclaimed. And the Fact, whether War or no, is triable by the Jury; and public Notoriety is sufficient Evidence of the Fact. And if the Subject of a foreign Prince in Amity with us, invadeth the Kingdom without Commission from his Sovereign, he is an Enemy. And a Subject of *England* adhering to him is a Traitor within this Clause of the Act. Or if an Alien

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II.

5. St. Tri.
Vaughan's
Case. Salk.
635.

5. St. Tri.
Vaughan's
Case.

Alien *Amy* acteth in an hostile Manner against us under a Commission from a Prince or State at Enmity with us, he is an Enemy within the Act. And adhering to him is Treason within this Clause.

So if a Subject of *England* maketh actual War on the King's Allies engaged with him against the Common Enemy, as was the Case of the States-General in our Wars against *France* in the Time of King *William* and the late Queen, this is adhering to the King's Enemies, though no Act of Hostility is committed against the King or his Forces. For by this the common Enemy is strengthened and the King's Hands are weakened.

SECT. 13.

5. Tri. 21. 22.
Vaughan's
Case. Salk.
634. S. c.
Keil. 20.
See Chap. 1.
S. 1.

2. Vent. 316.
and Vaugh-
an's Case.

SECT. 13. IN Prosecutions for these Treasons as well as for that of compassing the Death of the King, an Overt-Act of the Treason must, as I have already observed, be charged in the Indictment and proved. This Rule is grounded on the Words of the Statute, which being a declaratory Act must be strictly pursued. The Words to this Purpose are "Where a Man doth compass, &c.—or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm giving them Aid or Comfort in the Realm or elsewhere, and thereof be *pro- vablement*, i. e. upon full Proof] attainted of *open Deed*." And therefore it will not be sufficient to alledge generally that the Defendants did levy War or adhere. But in the former Case it must be alledged that they did assemble with a Multitude armed and arrayed in a warlike Manner and levied War. And in the latter Acts of Adherence must be set forth.

7. W. 3.

BUT the particular Facts done by the Defendants or a Detail of the Evidence intended to be given need not be set forth in either Case. The Common-Law, as I have already said upon a like Occasion, never required this Exactness: and the Statute of King *William* doth not make it necessary to charge particular Facts, where it was not necessary before. This was agreed by the Judges at a Conference on the Cases of *Damaree* and *Purchase* before cited. MSS. *Tracy* and *Denton*. And in the Cases of *Benstead*, and *Messenger* and *Vaughan* before cited, and of the Persons concerned in the Rebellions of 1715 and 1745, it was not thought necessary.

CHAP.

Touching the Act of the 7. William III. for regulating Trials in Cases of Treason and misprison of Treason.

BISHOP Burnet informeth us that this Act passed Burnet V. 2. after a long Struggle, contrary to the Hopes and Expectation of the Persons then at the Head of Affairs. 141. 143. 161. "The Design of it," he saith, "seemed to be to make Men as safe in all treasonable Practices as possible." This is a grievous Imputation on the Persons who forwarded the Bill in either House of Parliament, and might have been spared. But I believe it was the *Language* of many, and the *Opinion* of some of the Party with which the Bishop stood connected.

HAD the Bill required two Witnesses to the same Fact at the same Time, as his Lordship saith it did, it would indeed have rendered Men very secure in treasonable Practices: but then it will be difficult to reconcile this to what he saith in a few Lines afterwards. For after setting forth the Substance of some of the principal Clauses, particularly that relating to two Witnesses to the same Fact at the same Time he addeth, "all these Things were in *themselves just and reasonable*: and if they had been moved by *other Men* and at *another Time*, they would have met *with little Opposition*."

THE Bill did not come to the royal Assent during the Session it was brought into Parliament. For the Clause which requireth that all the Peers shall be summoned upon a Trial of a Peer for Treason or Misprison of Treason, a Provision founded in sound Sense and strict Justice, was added by the Lords: and the Bill with that Amendment sent back to the Commons, who disagreed to the Amendment: and so the Bill dropped for that Session.

In a subsequent Session the Commons sent up their own Bill again, and the Lords added their Clause, which, saith the Historian, "was not easily carried; for those who wished well to the Bill looked on this as a Device to lose
" it,

CHAP.
III.A^o 1695.
Kennet's
Hist. 3^d Vol.
699. 701.

" it, *as no doubt it was*, and therefore opposed it: but
 " contrary to the Hopes of the Court the Commons
 " were so desirous of the Bill, that when it came down
 " to them they agreed to the Clause. And so the Bill
 " passed and had the Royal Assent."

SOME Reflections might be made upon the Spirit of
 Faction which possessed both Sides, in this Competition
 of Parties, but I forbear. And proceed to offer a few
 Observations on the several Parts of the Act.

SECT. I.

SECT. I. MY first Enquiry will be, what Treasons
 are within the Act, and how the Law standeth with Re-
 gard to those that are not. By the general Tenor of
 the Act it extendeth to such High Treasons *only* where-
 by " any Corruption of Blood may or shall be made to
 " the Offender or his Heirs and to the Misprision of
 " such Treasons."

THE first and second Sections are expressly confined to
 those Treasons, and the Misprision of them: and all the
 other Clauses, except those relating to the Trial of
 Peers, and to the Rejection of Evidence of Overt-Acts
 not laid in the Indictment, use Words of plain Reference
 to the Treasons mentioned in the first and second Sections.
 And the 13th Section expressly excludeth the Treasons of
 Counterfeiting his Majesty's Coin, the Great Seal, Privy
 Seal, Signet, and Sign Manual.

THE Case of Petty Treason therefore standeth upon
 the Foot it did before this Act, and so do the Treasons
 that are expressly excluded. And all the Treasons crea-
 ted by Acts saving the Corruption of Blood stand likewise
 on the same Foot.

THE Statutes saving the Blood are, 5 *Eliz.* c. 1. S.
 10. 11. 12. concerning the Papal Supremacy, 5 *Eliz.* c.
 11. — 18 *Eliz.* c. 1. — 8, 9 *W.* 3. c. 25. and 15,
 16 *Geo.* 2. c. 28. touching the Coin. I do not recol-
 lect any more of that Kind.

SECT. 2.

SECT. 2. HAVING mentioned these Acts saving the
 Corruption of Blood, I will take Notice of a remarkable
 Difference in the wording of them, though something fo-
 reign to the present Enquiry. They all agree in saving the
 Blood,

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Blood, but the Acts of Queen *Eliz.* go further and provide that “no forfeiture of Lands shall be *but during the Life of the Offender.*” These Words are omitted in the Act of King *William* and in that of *GEORGE 2^d*. And therefore with regard to the Treasons created by these Acts, the Lands of the Offender will be forfeited to the Crown, though the Blood of the Heir remaineth uncorrupted.

IN the Case of Felony, a bare saving the Corruption of Blood preserveth the Descent to the Heir; because in that Case the Lord of the Fee becometh intitled by way of meer Escheat, *propter defectum Sanguinis*; and consequently while the Blood of the Heir remaineth uncorrupted there can be no Escheat. But in the Case of High Treason the Forfeiture, sometimes but improperly called the *Royal Escheat*, accreweth to the Crown of whomsoever the Land is holden, *propter delictum tenentis*. And doubtless the Offence is not purged by such saving Clause, though the Blood of the Heir is saved.

THIS Distinction was taken in a Cause in the Exchequer in *May 1709*, between *Kirton* (a Trustee for Baron *Lovell*) and *Horton* and others. One *Horton* had a Lease to him and his Heirs during three Lives, and was attainted for one of the Treasons touching the Coin created by the 8th and 9th of King *William*. Baron *Lovel* got a Grant from the Crown of this Lease. It was held by *Ward* and *Bury*, *Price* dissenting, that this Lease was forfeited to the Crown, and decreed accordingly. And in *January 1709*, the Decree was affirmed in Parliament by Advice of all the Justices of both Benches, except *Holt*, who was absent, and *Powell* who dissented. *Trevor* and *Tracy* held that there is no difference between such a Lease and an Estate of Inheritance; for the Heir under such a Lease taketh by Descent, to which *Powell* agreed. But most of the Judges confined themselves to the Case of a freehold Lease; and would not give any Opinion with regard to an Estate of Inheritance.

MS. Tracy,
and Salk. 85.

SECT. 3. A Question may possibly be made whether the Benefit of this Act is to be extended to all Treasons working Corruption of Blood created by *Subsequent Acts*, wherein

SECT. 3.

CH A P. wherein the Benefit of the Act is not saved by special Provision: because the Legislature, which is presumed to do nothing in vain, hath in some Instances made express Provision for that Purpose. I should not have mentioned this as a Matter of Doubt if Lord * *Hale* had not in a similar Case, I mean touching the Extent of the Statutes of E. 6, entertained a doubt grounded on the same Presumption. For my Part, I think the Benefit of the Act ought to be extended to Prosecutions for all Manner of high Treasons, *working Corruption of Blood* and not within the Exceptions, though created by Acts subsequent to it. The Words of the Act take in every possible Case, "All" "and every Person or Persons that Shall be accused or indicted for high Treason, &c." the Principles and Views upon which the Legislature proceeded, as they are set forth in the Preamble, will govern every future Case under the like Circumstances. And the known Rules of Construction oblige us to construe an Act so beneficial, as liberally as may be; that is, to extend it as far as the Letter, and especially the visible Scope and Intention of it will warrant Us.

ARGUMENTS founded on a general Presumption of the Wisdom and Circumspection of the Legislature always will and ought to have their Weight. It hath been said, and many Times with great Propriety, that the making special Provision in certain Cases by statute implieth that the Law had not before provided for those Cases; *for the Parliament doth nothing in vain*. This is a good general Rule, but it is very well known not to be universally true. But admitting it was so, yet many valuable Purposes, which Wisdom and a just Concern for the publick Welfare will suggest, may be answered by an express Provision, not in itself of absolute indispensable Necessity: sometimes for removing Doubts where different Opinions have been entertained; and at other Times out of abundant Caution for obviating Doubts that possibly may arise. The Instances of both Kinds are numerous and need not be mentioned in this Place. One I will mention because it cometh very near to the present Case, and naturally falleth into a Discourse concerning Trials in Case of high Treason.

* See 1. *Hale* 297. 324. 2. *Hale* 287, 288. the learned Author speaketh with great Uncertainty upon the Question.

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THE Privilege of Peerage in those Cases is a Right as C H A P. III.
universally known and as well established as any Right
can possibly be. It is a constitutional Right recog-
nized by *Magna Charta*. And yet we find special
Savings of the Right of Peerage in many of the Acts of
Parliament creating new Treasons about the Time of
the Reformation, and down to the Reign of *James* the
First. Though many of those Acts had before declared,
that the Offenders being convicted *according to due Course*
of Law, shall suffer and forfeit &c. which rendered an
express Provision saving the Rights of Peerage quite
needless.

THESE Savings might possibly be inserted out of abun- Stanf. Pl.
dant Caution, lest it should be argued (there were I doubt Cor. L. 3.
in those Days Tools of Power capable of arguing) that c. 1.
the Privilege being founded on immemorial Usage, could
not take Place with regard to Treasons created within
Time of Memory. They might, I say, possibly be in-
serted to obviate that Doubt. And with better Colour of
Law and Reason, they might be inserted in the Statutes
for the Trial of Treasons committed in foreign Parts or
on the high Seas; in order to take the Case of Peers out
of the general Words, by which new Jurisdictions un-
known to the Law with Power to hear and determine
such Offences were created. But even in those Cases
the Saving was in my Opinion quite unnecessary unless by
way of abundant Caution, though I confess *Stanford* in the
Passage last referred to in the Margin thinketh otherwise.
For constitutional fundamental Rights will not be abro-
gated by general Words in Statutes made for special Pur-
poses.

It is plain that the Legislature in succeeding Times
thought the saving Clause unnecessary in any Case whatso-
ever. For it is not inserted in one Act now in Force creat-
ing a new Treason, since the Revolution.* Though in 9. W. 3. 1.
some of them Provision is made for the Trial of such Trea- 13. 14. W.
sons in any County within the Kingdom, if perpetrated in 3. 3.
foreign Parts. And in the Clause inserted in the 7th of 3. 4. An. 14.
Queen *Anne* for the Trial of foreign Treasons and Trea- 17. Geo. 2.

* The temporary Acts against Mutiny and Desertion made
in Queen *Anne*'s Time have Clauses saving the Rights of Peer-
age with regard to the Offences made Treason or Felony by
those Acts. And also for giving the Benefit of the 7th of
King *William* to all Persons upon Trials for such Treasons.

CH A P. sons committed on the high Seas in the Court of Justiciary
 III in *Scotland* or by special Commission; in Conformity to the Statutes of *H. 8.* made for that Purpose, there is no Saving of the Right of Peerage. But had the Saving been judged absolutely necessary it would have been inserted in every Act creating a new Treason, and above all in that I last mentioned; and likewise in every Act creating a new Felony. For new Felonies and new Treasons stand in this Respect upon the same Foot.

By Parity of Reason I conclude that if the Legislature had thought it of *absolute Necessity* to save to the Subject by special Proviso the Benefit of the Act now under Consideration, such Proviso would have been inserted in every Statute creating new Treasons since that Time. But the Acts of the 9. *W.* and 3. 4. *Anno* before referred to are the only Acts now in Force wherein I find it to have been done.

SECT. 4.

SECT. 4. WHEN I say that the Statute extendeth to such high Treasons *only* which work a Corruption of Blood, I would be understood to mean such Treasons where the Corruption of Blood is *not saved by Statute*. For if high Treason ordinarily working Corruption of Blood, (as all high Treason doth where the Blood is not saved by special Proviso,) if such Treason be committed on the high Seas, the Defendant in a Proceeding directed by the Statute of *H. 8.* will be intitled to the full Benefit of this Act; notwithstanding it hath been doubted, I think without just Grounds, whether a Corruption of Blood is wrought in that Proceeding.

Salk. 85.

1. Hale 354.
355.

SECT. 5.

SECT. 5. BEFORE I conclude this Enquiry touching the Extent of the Statute, I will just mention the Offences of importing Money counterfeit to the Similitude of *English* Coin counterfeiting foreign Coin legitimated by Proclamation, and of importing such Coin. These Treasons work a Corruption of Blood, and as such are brought within the general Purview of the Act; and do not come within the *Letter* of the Exception which in the Case of Coin mentions only the Offence of *counterfeiting* his Majesty's Coin. Whether this beneficial Law shall be extended to those

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III.

those Treasons, or whether by the Rule of Congruity they shall stand upon the same Foot with the Offence of counterfeiting the Coin of the Kingdom, as in some Cases all Treasons concerning the Coin do; these Questions will be very fit to be considered whenever the Cases shall happen, which probably will not be very soon.

FOR Prosecutions for the first of those Offences have been very rare: and for the others there can be none, as Things stand at present, 'till the Crown shall be advised to legitimate some Species of foreign Coin. I know of none now current among Us that is legitimated, and most probably none will. For if the Offences of counterfeiting and diminishing foreign Coin and of importing such counterfeit and diminished Coin, which are great Evils, and daily growing, were made more penal than they are at present, I know of no good End that could be answered by legitimating any Species of it; on the other Hand I foresee great Inconveniences that would attend it.

As to the Treasons which are not within the Act, I shall be very short in this Place. Petty Treason is intitled to the Benefit of the Acts of the 1st and 5th of E. 6. as far as concerns the Point of Evidence; and by 1. 2. Ph. and M. it is intitled to a Trial according to the due Course and Order of Common-Law. The Treason created by the 5th of Eliz. already mentioned standeth in both these Respects upon the same Foot.

c. 10.

c. 1.

THE other Treasons not comprehended in the general Words or excepted, relating to the Coin and the Seals &c. are likewise intitled to a Trial according to the due Course and Order of the Common-Law, and to all the Advantages incident to that Method of Trial, which will be hereafter more particularly mentioned.

I now proceed to the other Parts of the Act.

I shall not consider the several Clauses in the Order they stand, but as far as I can, I will range them under the following Heads. What Privileges the Prisoner is intitled to, and what is incumbent on him *previous* to the Trial, and what *during* the Trial. The Clauses which do not fall under these Heads will be last considered.

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THE

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III.
SECT. 6.

SECT. 6. THE Prisoner is to have a Copy of the whole Indictment, but not of the Witnesses Names, five Days at least before the Trial in order to enable him to advise with his Council thereupon, to plead and make his Defence; his Attorney or Agent or any Person on his behalf requiring the same, and paying reasonable Fees for the Writing thereof, not exceeding 5 s. for the Copy of any one Indictment. (*Sec. 1.*)

AND if he desireth Council, the Court where he is to be tried or any Judge thereof, shall immediately upon request assign him such and so many Council, not exceeding two, as he shall desire: and such Council shall have free Access to him at all seasonable Hours. (*Ibid.*)

HE shall likewise have a Copy of the Pannel of the Jurors who are to try him duly returned by the Sheriff, and delivered to him two Days at least before his Trial. And he shall have the like Process to compel his Witnesses to appear at the Trial for him, as is usually granted to compel Witnesses to appear against Prisoners in the like Case. (*Sec. 7.*)

7. An. c. 21. THE 7th of the late Queen, whenever it shall fully take Effect, will make some material Alterations in the Law touching Copies of the Indictment and Pannel. And therefore before I conclude some Notice shall be taken of it.

4. St. Tri.
411. to 414.

AT Common-Law no Prisoner in capital Cases was intitled to a Copy of the Indictment or Pannel, or of any of the Proceedings against him. Many Persons, it is true, have upon their Arraignment insisted on a Copy of the whole Indictment, but it hath been constantly denied. It was denied in the Case of Lord *Preston* and the two other Gentlemen indicted with him, by the unanimous Opinion of the Judges present, who declared that it never had been granted, though frequently demanded. And Lord *Preston* having said that it was granted to Lord *Ruffel*, *Holt* told him that he and some other of the Judges present who were of Council for that Lord did not advise him to demand it. "For, saith he, we knew he could not have "it by Law." Lord *Preston*, not satisfied with this Answer prayed that Counsel might be assigned him to argue that

Point

Point; which the Court unanimously refused, it being, CHAP.
they said, *a Point that would not bear a Debate.* III.

THE Statute of the 46. E. 3. which had been formerly insisted upon by Prisoners in the like Case, was much pressed in this. It is not in Print among the Statutes, but an attested Copy from the Roll was read at the Prisoner's Request, and is printed in the Trial. It plainly relateth to such Records in which the Subject may be interested, as *Matters of Evidence upon Questions of private Right.* And it enacteth, "That all Persons shall for the future have free Access to them, and may have *Exemplifications* of them whether they make for or against the King." This was the Opinion of the whole Court.

IN the Case of *Charnock, King, and Keys* whose Trials came on after the passing this Act and about a Fortnight before it took place, they were denied a Copy of their Indictment; though they argued with a great deal of Plausibility that they were within the Reason and Equity of the Act at that Time, as much as they would have been if their Trial had been brought on a Fortnight later. Ibid. 551.
552.

IN these Cases, and in the Case of the Assassins whose Trials came on before the Commencement of the Act, the Prisoners as soon as they had pleaded, had Copies of the Pannels delivered to them; and their Trials were postponed, that they might be better enabled to conduct themselves with regard to their Challenges. But this the Court declared to be Matter of Favour and not of Right. And Council and Solicitors were permitted to attend them in Prison previous to their Trials. This likewise was an Indulgence which they could not claim of *strict* Right, and in bad Times hath been generally denied.

It will not I hope be thought superfluous to have shortly stated how these Matters stood at Common-Law; since all high Treasons not within the Act, and all Felonies, in which I include petit Treason, stand in these Respects upon the Foot of Common-Law.

THOUGH the Act mentioneth only the Copy of the Indictment, yet the Prisoner ought to have a Copy of the 4. St. Tri.
656. 734.
Caption delivered to him with the Indictment: for this in many Cases is as necessary to enable him to conduct himself in pleading, as the other. This is now the constant Practice.

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III.

Ibid.

BUT if the Prisoner pleadeth without a Copy of the *Caption*, as some of the Assassins did, he is too late to make that Objection, or indeed any other Objection that turneth upon a Defect in the Copy; for by Pleading, he admitteth that he hath had a Copy *sufficient for the Purposes intended by the Act*.

4. St. Tri.

Rookwood.
Lowick.
Cranburn.

By the Letter of the Act the Copy is to be delivered five Days before the Trial, but upon the true Construction of it, the Copy after the Bill is found, for 'till then it is no Indictment, ought to be delivered five Days before the Day of Arraignment, for that is the Prisoner's Time for pleading. And the five Days must be exclusive of the Day of Delivery and the Day of Arraignment.* So with Regard to the Copy of the Pannel, the two Days must be exclusive of the Day of Delivery and the Day of Trial. These Points have been long settled and are now Matters of constant Practice.

4. St. Tri.

651. to 655.

THOUGH the Words of the Statute are, that the Prisoner shall have a Copy of the Pannel *duly returned by the Sheriff*, yet if the Copy should happen to be delivered before the Return of the Precept, which upon a bare Commission of Oyer and Terminer is commonly made returnable on the Day intended for the Trial, it will be sufficient. For it satisfieth the Words of the Statute and answereth all the Ends of it.

But. V. 7. An.
c. 21. inf.

THE little Tract intituled "The Method of Trial of Commoners in Cases of high Treason" published in the Year 1709 by Order of the House of Lords directeth that the Additions of Dwelling-Places and Professions of the Jurors be inserted in the Copy of the Pannel; but the Act doth not require that Exactness, and the Practice is otherwise.

IF the Prisoner would avail himself of an Defect in the Indictment by miswriting, misspelling, false or improper Latin, he must take his Exceptions, *before Evidence given* in open Court, these are the Words of the Act. (*Sec. 9.*)

* Upon the Commissions which sat in *Surry* and in the North for the Trial of the Rebels in the Year 1746, the five Days, as I have already said, were likewise exclusive of an intervening *Sunday*, that not being thought a proper Day for the Prisoner's advising with his Counsel or preparing for his Defence. It was so ordered upon a like Commission in the North in the Year 1716 for greater Caution and to obviate all Objections. But the Statute doth not require it.

BUT

BUT though the Act is thus worded, the Construction CHAP. III.
 of it hath been, that Exceptions grounded on those Mistakes must be taken *before Plea pleaded*. And in the Cases of Captain *Vaughan* already cited and of one *Sullivan* at the *Old Baily*, *October 1715*, and of Mr. *Laver*, the Court refused to hear such Exceptions after Plea. It is true that in *Cranburne's Case* the Court did permit his Council to take those Exceptions after Plea, and in *Rookwood's* after the Jury was sworn. But it ought to be remembered these were Indulgences to the Prisoners upon a new Act, and before the Practice was settled to the contrary, as it now is.

I come now to the Privileges the Prisoner is intitled to during the Time of his Trial.

SECT. 7. HE is to have the Assistance of his Council throughout his Trial, to examine his Witnesses,* and to conduct his whole Defence as well in Point of Fact as upon Questions of Law. (SECT. 1.)

AT Common-Law no Council was allowed upon the Issue of guilty or not guilty in any capital Case whatsoever, except upon Questions of Law. And then only in doubtful, not in plain Cases. I am far from disputing the Propriety of this Rule while it is confined to Felony and the lower Class of Treasons concerning the Coin and the Seals. I know many Things have been thrown out upon this Subject, and Inconveniencies some real some imaginary, have been suggested by popular Writers, who seem to have attended singly to those on one Side of the Question. But it is impossible in a State of Imperfection to keep clear of all Inconveniencies; though Wisdom will always direct us to the Course which is subject to the fewest and the least. And this is the utmost that human Wisdom can do.

IN State-Prosecutions which are the Objects of this Act, and are carried on by the Weight of the Crown and too often in the Spirit of Party, and are generally conducted by Gentlemen of high Rank at the Bar, it is extremely reasonable to allow the Prisoner the Assistance of Council, to the full extent of the Act. But this the Common-Law did not allow. Accordingly it was refused to every Person con-

* N. B. By 1. An. c. 9. the Witnesses for the Prisoner are to be upon Oath in *all Cases of Treason or Felony*.

CHAP.

III.

4. St. Tri.

cerned in the Assassination-Plot whose Trials came on after this Act had passed the royal Assent, but before the Commencement of it. And in Sir William Parkins's Case the very Day before the Act took place, Holt said upon the Occasion, "*We must conform to the Law as it is at present, not to what it will be To-morrow, we are upon our Oaths so to do.*" Council as to Matters of Fact was likewise denied to Lord Winton and to Lord Lovat, being in the Case of an Impeachment which is excepted* out of the Act. But all the Prisoners I have mentioned had, through the Benignity of the Times, Council to attend them in Prison previous to their Trials.

Stra. 824.

See the Report.

19. Geo. 2.

UPON the Trial of Issues that do not turn upon the Question of guilty or not guilty but upon collateral Facts, Prisoners under a capital Charge whether for Treason or Felony, always were intitled to the full Assistance of Council. *Humphry Stafford* in the 1st of Hen. 7. had Council on his Plea of Sanctuary. *Roger Johnson* whose Case is before reported had Council on the Error in Fact assigned by him for reversing his Outlawry, though in a Case concerning the Coin. And so had *John Harvey* and every Prisoner in the like Case with him upon the Issue taken upon the several Matters alledged in the Suggestion filed on the Part of the Crown, pursuant to the Act of the 19th of Geo. 2^d.

SECT. 8.

SECT. 8. I come now to the Head of Evidence which divideth itself into two Branches. *What Number of Witnesses doth the Act require, and What Matters may be given in Evidence.* And though I have postponed the Consideration of this Part of the Act to this Place, yet whatever will be said with Regard to Evidence at the Trial, must be applied to the Evidence which shall be given on the Indictment.

1. E. 6. & 5.

E. 6.

1. 2. Ph. M.

I know a Difference hath been taken in the Construction of the Statutes of E. 6. and of Ph. and Ma. between the Indictment and the Trial. But this Distinction is entirely without Foundation even upon the Foot of those Statutes.

* By the 20th of George 2^d. Council is allowed in the Case of an Impeachment. And with great Reason, since the Defendant is struggling under the whole Weight of the Commons of Great Britain.

But

But the present Act hath not left room for that Distinction. It enacteth that “ no Person shall be *indicted*, “ tried, or attainted of any Treason whereby any Corruption of Blood may be made to the Offender or his “ Heirs or of the Misprision of such Treason, but upon “ the Oaths of two lawful Witnesses; either both to “ the same Overt-Act, or one of them to one and another to another Overt-Act of the *same Treason*: unless he shall willingly and without violence in *open Court* confess the same. Or shall stand mute, or refuse to plead, or in Cases of High Treason shall peremptorily Challenge above the Number of 35 of the “ Jury.” (*Secl. 2.*)

“ PROVIDED that any Person being indicted as aforesaid for any of the said Treasons or Misprisions, may “ be outlawed and thereby attainted. And in Cases “ of the High Treasons aforesaid where by the Law, “ after such Outlawry, the Party outlawed may come “ in to be tried, he shall upon such Trial have the Benefit of this Act. (*Secl. 3.*)

“ AND it further enacteth and declareth that if two “ or more distinct Treasons of divers Heads or Kinds “ shall be alledged in one Bill of Indictment, one Witness to one of the said Treasons and another Witness “ to another of the said Treasons shall not be deemed “ two Witnesses to the same Treason within the meaning “ of the Act.” (*Secl. 4.*)

It hath been generally agreed, and I think upon just 3. Inst. 26. Grounds, (though Lord Coke hath advanced a contrary Doctrine) that at Common-Law one Witness was sufficient in the Case of Treason as well as in every other capital Case. The only Difficulty hath been upon the Construction of the Statute of *Pb.* and *Ma.* whether that Act hath repealed the Statutes of *E. 6.* *as far as they make two Witnesses necessary in all Cases of Treason.*

It may possibly be judged needless at this Time to enter far into this Inquiry. But since the Statutes of *E. 6.* plainly extend to petit Treason and the Act now under Consideration as plainly doth not, it will not be Time altogether mispent to clear up this Point. For petit Treason standeth in this Respect singly on the Foot of the Statutes of *Ed. 6.*

I do

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Dy. 99. 100.

1. St. Tri.

I do not find upon looking over the * state Trials that in Crown-Prosecutions any great Regard was paid to the Acts of E. 6. for near a Century after they were passed; or indeed to the common well-known Rules of legal Evidence. Though the Authors who wrote in those Days do sometimes speak of the Acts as then in force. In the Case of *William Thomas*, when they were undoubtedly in force, they were rendered quite nugatory by this very extraordinary Resolution, that *one Witness of his own Knowledge, and another by Hearsay FROM HIM*, though AT THE THIRD OR FOURTH HAND, made two Witnesses or Accusors within the Acts. And in the Case of *Sir Nicholas † Throckmorton* which came to Trial the same Term, no sort of regard was paid to them. For though the Prisoner strongly insisted on the Benefit of them, particularly of that which requireth the Witnesses to be brought Face to Face upon the Trial, the Council for the Crown went on in the Method formerly practised, reading Examinations and Confessions of Persons supposed to be Accomplices, some *living and amesneable*, others *lately hanged for the same Treason*.

IN many of the succeeding Trials the Prisoners were told that the Statutes of *Edw. the 6th* were repealed, particularly that which required two Witnesses Face to Face; that this Law had been found dangerous to the Crown; that Witnesses may be prevailed upon to unsay in Court what they have said upon their Examinations; that the Confessions of Persons accusing themselves are the strongest of all Evidence against their Accomplices; that their Partners in Guilt are the *Gens de leur Condition* the Statute of Treasons ‡ speaketh of; and that Confessions, though not signed by the Party, are of equal Weight with those that are signed. This every Man who will do so much Penance as to read over the State Trials during the Reigns of *Queen Eliz.* and *King James*, will find to have been the Doctrine and Practice of the Times. And I do not see that the Case of *Sir Walter Raleigh*, whose Trial having been long since printed and prefixed to his History hath been more gene-

* See the State Trials from the 1st *Queen Mary* to the Restoration.

† These Cases came on in *Easter Term* 1. *Mar.* and the Parliament of the 1st and 2^d *Pb. and M.* did not meet till *November* following.

‡ The Words of the Statute are, *et de ceo soit provablement Attaint* — *par Gens de leur Condition*; meaning plainly the *Judicium Parium* required by *Magna Charta*.

rally

rally read and censured than others, I do not see that that Case, always excepting the extraordinary Behaviour of the King's Attorney, did in Point of Hardship differ from many of the former.

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III.

Coke.

IN succeeding Times, when People of all Ranks and Parties had in their Turn been learning Moderation in the School of Adversity, Light began to dawn upon us. Lord *Coke*, after his Disgrace at Court had given him Leisure for cool Reflection, was of Opinion that the Statutes of *Ed. 6th* touching Evidence are not repealed by 1. 2. *Pb.* and *Ma.* that two Witnesses are still required in Cases of Treason; not barely upon the Indictment, which he stateth as an Opinion entertained by some, but also upon the Trial. This as far as I can collect from the Passages I have cited was the Result of all his Searches into this Matter; though he doth not in every Part of the Passage express himself with that Light and Precision which the Importance of the Subject required.

3. Inst. 24. to 27.

IN the Case of Mr. *Love, Hale* who was Council for him, insisted that two Witnesses are necessary upon the Trial in Case of Treason, upon the Foot of the Statutes of *Edw. the 6th* not repealed, he saith, in Point of Testimony by the Statute of *Pb. and Ma.*; and one of the Council on the Side of the Prosecution, who upon the whole argued with Candour, admitted that the Statutes of *E. 6.* are not repealed by that of *Pb. and M.* and that two Witnesses are still necessary; but insisted, that one Witness to one Overt-Act, and another to another Overt-Act of the same Species of Treason are two sufficient Witnesses within the Acts. This Gentleman was the first I have met with who considered the Point in this Light; in which, as I shall shew presently, it hath been considered ever since the Restoration.

2. St. Tri.

144. 171. to 173. and 177.

Sir Tho. Withrington.

HALE in his Summary is clear that the Statutes of *Ed. 6.* require two Witnesses to the *Petit Jury* in the Case of Treason. And this, saith he, standeth notwithstanding the Stat. of the 1. 2. *Pb. Ma.* But in his History of the Pleas of the Crown, he speaketh more doubtfully. He saith in one Place, that it hath been held by many that the Statutes of *E. 6.* are still in Force notwithstanding 1. 2. *Pb. M.* In another that two Witnesses are required up-

Sum. 262.

1. Hale 296.

CH A P. *on the Indictment, not upon the Trial.* In a Third, after having said that it is agreed on all Hands that the Stat. of **III.** *Pb. and M. taketh away the Necessity of two Witnesses on*
2. Hale 286. *the Trial,* he proceedeth to consider the Opinion of those
1. Hale 298. who argued that the Trial being the sole Object of that
to 300. Statute, it did not take away the Necessity of two Witnesses on the Indictment, since the Indictment and Trial are in their Opinion two distinct Things.

He then offereth many strong Reasons founded on great Authority against that Distinction; and sheweth that the Indictment ought to be considered as inseparably incident to the Trial and in Truth a Part of it. And concludeth thus, " And thus the Reasons stand on both Sides; and " though those seem to be stronger than the former, yet " in a Case of this Moment it is safest to hold that in " Practice which hath least Doubt and Danger, especially in Cases of Life." Thus far the learned Judge appeareth to have been doubtful *at least*, to say no more. But in another Passage speaking of Informations in capital Cases taken by Magistrates upon Oath, and in what Cases and under what Restrictions they may be read in Evidence, he saith, " Though Informations upon Oath taken before a Justice of the Peace may make a good Testimony to be read against the Offender *in Case of Felony* " where the Witness is not able to travel, yet in Case of " *Treason where two Witnesses are required* such an Examination is not allowable; for the Statute requireth, " that they (if living) be produced upon the Arraignment in the Presence of the Prisoner, to the End he " may cross-examine them." The Statute his Lordship mentioneth can be no other than the 5. 6. E. 6. Some other Passages I might have cited from the History of the Pleas of the Crown, where the learned Author fluctuateth between two opposite Opinions upon this Point, but these are sufficient.

p. 9. KEILING reporteth that at a Conference among the Judges preparatory to the Trial of the Regicides, it was agreed that the Law requireth two Witnesses in the Case of Treason; but that one Witness to one Overt-Act of compassing (for compassing the King's Death was the Treason then under Consideration) and another Witness to another Act of compassing, make two Witnesses of compassing.

compassing. He afterwards speaketh very doubtfully upon this Point; and at length saith, that it seemed to him *that one Witness is sufficient in Treason, and that the 1. 2. Pb. and M. had repealed the Statutes of E. 6.* p. 18. 49.

AT Lord Stafford's Trial the Necessity of two Witnesses was treated as a Point beyond all Doubt. But his Lordship insisting that there ought to be two to *each Overt-Act*, all the Judges present delivered their Opinions *seriatim*, and declared that one Witness to one Overt-Act, and another to another Overt-Act of *the same Species of Treason*, are two sufficient Witnesses within the Statutes: otherwise no Government could be safe if Traitors had but Craft equal to their Villainy. From that Time the Point hath been settled. And in the succeeding Trials of that Reign and the next, though many irregular Things were done favouring of the Times, this Rule still kept its Ground. And in all the Trials after the Revolution before the Act of the 7th of King William took Place, it was strictly observed. 3. St. Tri. 4. St. Tri.

HAVING given this short History of the Difficulty which hath been founded on the Statute of *Pb. and M.* I will take the Liberty of offering my own Thoughts upon it.

I conceive that the Clause upon which the Doubt arose, "that all Trials for any Treason shall be according to the due Order and Course of the Common-Law and not otherwise," was intended in Favour of the Subject, not in the least to his Prejudice. It was founded in the same Principle, and directed to the same salutary Ends, which the Statute made but the Year before reducing all Treasons to the Standard of the 25. E. 3. had in View. By the one, the Subject was secured in his Journey through Life against the numerous Precipices which the Heat and Dis-temper of former Times had opened in his Way; the other restored to him the Benefit of a Trial by a Jury of the proper County, with all the Advantages for Defence peculiar to that Method of Trial, where former Statutes had deprived him of it. This I apprehend was the sole Intent of this Clause, which will be better explained by what followeth.

By 32. H. 8. Treasons committed in *Wales* or where the King's Writ runneth not, were to be tried in such Shires

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c. 20.

c. 23.

Shires and by such Commissioners as the King should appoint. By 33^d of that King Persons committing Treason, and confessing it and afterwards becoming lunatick, might be tried *without being brought to answer*, by the like special Commission in any County the King should appoint. And by another Act of the same Year, Persons accused of Treason or Misprision committed in *England* or elsewhere, being examined by three of the Privy-Council and by them *vehemently suspected*, might be tried by special Commission in any County the King should appoint. And by the same Act, the peremptory Challenge in all Cases of Treason and Misprision was absolutely taken away.

THESE Acts were derogatory to the *due Course and order of the Common-Law*, and in many Instances grievous to the Subject. The Judges have therefore considered them all as repealed by this general Clause, so far as concerneth Treasons committed in *England* or *Wales*. By this Construction, the Trial by a Jury of the proper County with a peremptory Challenge of 35, which is with peculiar Propriety called a Trial according to the *due Course and Order of the Common-Law*, is restored.

28 H. 8. 15.

35. H. 8. 2.

c. 23.

BUT the Acts of the 28th and 35th of that Reign for the Trial of Treasons committed on the high Seas or out of the Realm, though they introduced a Method of Trial new in those Cases and unknown to the Common-Law, have not been held to be repealed by this Clause; nor is the 33. H 8. repealed as *far it concerneth Treason in foreign Parts*. For these Acts deprive the Subject of no Advantage for Defence to which he was before intitled. On the contrary, instead of a Trial according to the Course and Order of the Civil-Law, they introduced a Trial founded in the Wisdom and Benignity of the Common-Law, with all the Advantages for Defence incident to it; except only in the Point of Locality which the Nature of the Cases would not admit of.

BUT the Privilege the Subject is intitled to under the Statutes of E. 6. of having the Charge proved by two lawful Witnesses and those brought Face to Face at the Trial, a mighty Safe-guard against oppressive Prosecutions, was never intended to be taken away by this general Clause.

Nor

* See
Both th

Nor in truth did the Legislature apprehend that it could be extended so far. CHAP. III.

FOR by a subsequent Clause in the same Statute it is provided "that in all Cases of high Treason concerning Coin current within the Realm, or for counterfeiting the King's or Queen's Signet, Privy-Seal, Great-Seal, or Sign-Manual,* such Manner of Trial and none other shall be observed and kept as heretofore hath been used by the Common-Law of this Realm, any Law, Statute, or other Thing to the contrary notwithstanding." It will be extremely difficult to account for this Clause, which is admitted on all Hands to have taken away the Necessity of two Witnesses in the Cases touching the Coin and Seals, if the former Clause had done the same in all Cases of Treason whatsoever; the latter Clause was certainly inserted to effect something which the former had not. But I think the next Act maketh the Matter very clear if any Doubt remaineth on this. It enacteth, that in the Case of Offences therein enumerated touching the Coin the Offenders "may be indicted, tried, convicted, and attainted by such *like Evidence* and in such Manner and Form as hath been used and accustomed within this Realm, at any Time before the first Year of our late Sovereign Lord King E. 6." Here the Matter of Evidence, which appeareth to be the only Point then in Contemplation, is plainly expressed and extended by Name to the Trial as well as the Indictment; and the very Time when two Witnesses first became necessary in both Cases is pointed out.

I. 2. P. & M.
C. 11.

If the Legislature did intend by the former Act to take away the Necessity of two Witnesses in all Cases of Treason whatsoever, why did it not speak as plainly as it doth in this? And on the other Hand, if it was conceived that this was done by the general Words of the former Act, why is it done in special Cases in Terms so express by this? The different penning of two Clauses in one and the same Act, and also of two Acts depending at the same Time and probably passed the royal Assent on the same Day, convinceth me that the Legislature had in Contemplation two different Objects, distinct in their Na-

* See *Rastal's Stat.* I. 2. *Pb.* and *Ma.* c. 10. Sect. 8. 13. Both the Clauses at large.

CH A P. ture and Tendency: and accordingly made different Pro-
 III. visions respectively suited to the Nature of each.

I now return to the Statute of King *William*.

THOUGH it requireth two Witnesses to each Treason, yet a collateral Fact not tending to the Proof of the Overt-Acts, may be proved by one. For this Statute confineth itself to the Proof of the Treason, *the Proof of the Overt-Acts*. And the Statutes of *E. 6.* are confined to the Evidence for proving the Prisoner guilty of the Offences charged on him, which likewise must be understood of Overt-Acts.

5. St. Tri.
Salk.

THIS Difference between the Proof of Overt-Acts and of collateral Facts, was taken by Lord *Holt* in the Case of Captain *Vaughan*, who insisted and called Witnesses to prove that he was a Subject of *France* born in the Dominions of the *French* King. The Council for the Crown called Witnesses to prove him born in *Ireland*. And his Council insisting that there was but one credible Witness to that Fact, *Holt* said, "That is no Overt-Act, if there be one Witness to that it is enough; there need not be two Witnesses to prove him a Subject, but here are more." His Confession was likewise given in Evidence as to that Fact. But it appearing upon Cross-Examination, to have been made the Night he was taken and when very drunk, and the Fact of his Birth in *Ireland* being absolutely denied by him the next Morning upon his Examination taken before a Magistrate, little Regard seems to have been paid to his Confession.

1. Hale 304.
Keil. 18.
The Case of
Tong and
Others.
2. And. 67.

THE Case of a Confession made willingly and without Violence is excepted in this Act and in both the Statutes of *E. 6.* But there is a Difference in the wording these Statutes which I have thought did merit Consideration so far as to warrant a different Construction of them. The Words of this Act are, "unless the Party shall willingly and without Violence in *open Court* confess the same." The Words in *open Court* the Statutes of *E. 6.* have omitted. Those Words seem to have been inserted in order to carry the Necessity of two Witnesses to the Overt-Acts farther than the Statutes of *E. 6.* were formerly thought to carry it. For the Construction of those Statutes hath been, that a Confession upon an Examination of the Party, *taken out of*

Court

Court and before a Magistrate or Person having Authority to take such Examination, proved upon the Trial by two Witnesses is Evidence of itself sufficient to convict, without farther Proof of the Overt-Acts. For, say the Books, such Confession *putteth the Case out of the Statute, it satisfieth the Statute*: and by Confession is not meant a Confession before the Judge upon the Prisoner's Arraignment, but upon his Examination before a Magistrate: for, saith *Coke*, the Words, without Violence, mean willingly *without any Torture*, and the Judge is never present at any Torture, neither upon the Prisoner's Arraignment was ever any Torture offered.

3. Inst. 25.

BUT in the Year 1716. at a Conference among the Judges, preparatory to the Trial of *Francis Francia*, at which the Attorney and Solicitor General *who were to conduct the Prosecution the next Day* lent their Assistance, no Regard seemeth to have been paid to the Authorities I have cited; for it was then agreed that upon the Foot of those Acts of E. 6. by Confession is meant only a Confession *upon the Arraignment of the Party*, which it was said *amounteth to a Conviction*.

UPON the Trial of *John Berwick* A^o 1746, this Opinion, which I confess I had never heard of before, though I believe some of the Judges had seen it, was cited and much urged by the Council for the Crown; and a MS. Report of it was produced, of which I soon afterwards was favoured with a Copy.*

IN the Case of *Francis Willis* the Council for the Crown 8. St. Tri. called a Witness to prove what the Prisoner had said to him touching the Share he had in the Treason he then stood charged with. The Prisoner's Council objected to this Sort of Evidence, and insisted that by this Act no Confession, except it be made in open Court, shall be admitted in Evidence. But the Judges present were very clear that such Confession is Evidence *Admissible*, proper to be left to a Jury, and *will go in Corroboration of other Evidence* to the Overt-Acts. Though it might be still a disputable Point, whether a Confession out of Court proved by two Witnesses, is of itself *sufficient to Convict*. Upon this

* Evidence of a Confession was held sufficient by the learned Judges who sat upon the Commission in the North in the same Summer, upon the Authority of this Opinion.

CHAP.
III.

Sir James
Montague.
Sir Robert
Eyre.

last Point none of them, except Chief Baron *Ward*, delivered any *direct* Opinion; his Words are, "a Confession shall not supply the want of Evidence, *there must be still two Witnesses to the Treason*. But to say it shall not be given in Evidence, there is no Ground for it." The Attorney General admitted that two Witnesses are necessary besides the Confession. The Solicitor is more explicit and saith, "He (the Prisoner) shall not be convicted on a Trial, without two lawful Witnesses, that is the Thing provided for. It was to exclude a Precedent that had been settled in *Tong's Case* (the Case already cited from *Keiling and Hale*) "but it was not designed to exclude all Confessions. That was Evidence at Law, and always must be so. The Design of the Act was to exclude Confessions from having the Force of a Conviction, unless it were in a Court of Record. And to prevent a Confession proved by two Witnesses from being a sufficient Ground for a Conviction."

MSS. Tracy
and Denton.

IN the Argument in the Case of *Willis*, the Cases of *Vaughan** and of one *Smith* *alias May* were cited. *Vaughan's* Case hath been already mentioned. The Case of *Smith* was at an Admiralty Session in *June 7, An.* upon an Indictment for adhering to the Queen's Enemies on the high Seas. He made *Alienage* his Defence as *Vaughan* did; and his Confession that he was an *Englishman* born was held to be *Admissible* Evidence by *Trevor, Powell, Powis, Tracy, and Bury*, though his Council insisted on this Act of the 7th of King *William*. In that Case it was said by the Court that the 7th of King *William* was to prevent a Confession being *conclusive* Evidence of *the very Overt-Act*, not to take away that Sort of Evidence of *Collateral Matters*. And *Vaughan's* Case was cited and relied on.

IN Truth, with Regard to all collateral Facts not conducing to the Proof of the Overt-Acts, I think we may safely lay it down as a general Rule, that whatever was Evidence at Common-Law is still good Evidence under the Statute; which as I said before is confined to the Proof of the Overt-Acts.

* I think *Vaughan's* is the Case cited in *Willis's* Trial by the Name of *Ball*.

THE Reader sees that Opinions have been various touching the Sufficiency of this Sort of Evidence. But perhaps it may be now too late to controvert the Authority of the Opinion in 1716, warranted as it hath been by later Precedents. All I insist on is that the Rule should never be carried further than that Case warranteth, never further than to a Confession made during the Solemnity of an Examination before a Magistrate, or Person having Authority to take it: When the Party may be presumed to be properly upon his Guard, and apprized of the Danger he standeth in. Which was an Ingredient in the Case of *Francia* and of *Greg* cited in the Argument on *Francia's* Case. And in all those already cited which came in Judgment before the Statute of King *William*.

For hasty Confessions made to Persons having no Authority to examine, are the weakest and most suspicious of all Evidence. Proof may be too easily procured, Words are often mis-reported, whether through Ignorance, Inattention, or Malice, it mattereth not the Defendant, he is equally affected in either Case; and they are extremely liable to Mis-construction. And withall, this Evidence is not in the ordinary Course of Things to be disproved by that Sort of negative Evidence by which the Proof of plain Facts may be and often is confronted.

THE Distinction I aim at between Confessions made upon an Examination of the Party by a Magistrate or Person having Authority to examine, and hasty unguarded Declarations made in the hearing of Persons having no such Authority, may probably reconcile what fell from the Court and the King's Council in *Willis's* Case already mentioned, with the Opinion in *Francia's*. Since in the Case of *Willis* no Examination was had before a Magistrate or Person having Authority to examine, as there was in the other.

I would not in any Thing I have said be understood to malign the Proceeding in the Case of *Berwick* before mentioned. He was found in a Prison assigned by the Duke after the Surrender, to the Officers in the Rebel Garrison, and to none but Officers, whither he went with the Rest of them. He appeared among them and took the Rank of an Officer. These Facts together with his Declarations, all proved by two Witnesses, were I think very properly considered

CH A P. sidered by two learned Judges not as a bare Confession
 III. after the Fact, but as an Evidence upon the Spot and in
 the very Scene of Action. And with regard to the Pro-
 ceedings in the North already mentioned, I doubt not
 the learned Judges went upon good Grounds; the Cir-
 cumstances of each Case, which I am not apprized of,
 being duly considered.

THE wording of these Acts touching Confessions,
 “ unless the Party shall willingly and *without Violence*
 “ confess the same,” suggesteth a Matter which I will
 Fortescue de just mention. The Common-Law knew of no such Engine
 Laudibus of Power as the Rack or Torture to furnish the Crown
 &c. with Evidence out of the Prisoner’s Mouth against him-
 3. Inst. 35. self or other People. It was, as Lord Coke informeth us,
 first brought into the Tower by a great Minister in the
 Time of H. 6. directly, saith he, *against Law, and can-*
not be justified by any Usage. But in fact it was practised
 though I believe sparingly, and never saith King James,*
 but in Cases of high Treason, for more than a Century
 afterwards.†

THIS accounteth extremely well for the inserting the
 Words, *without Violence*, in the Statutes of E. 6. I can-
 not so easily account for them in that of King William.

SECT. 9. THIS Act in Substance followeth the Rule
 which had already taken place with regard to the Necessity
 of two Witnesses to the same Treason, but it goeth fur-
 ther, and lest the Prisoner should be surpris’d or con-
 founded by a Multiplicity and Variety of Facts which he

* See K. James’s Premonition to all Christian Princes and States, Edit.
 1609. p. 130.

† At the Trial of the Earls of *Essex* and *Southampton*, * the Attorney
 General extolleth the great Clemency of her Majesty towards the Conspira-
 tors, that none of them were put to the Rack or Torture; and acknow-
 ledgeth the Goodness of God towards her, and his just Judgment upon the
 Prisoners, that the Truth had been revealed by the Witnesses *without Rack*
 or Torture of any of them.

A Strain of Adulation, to say no worse of it, nauseous and sordid, highly
 unbecoming a Gentleman of the Profession. Especially one who well knew
 and hath informed his Readers that any kind of Torture in that Case would
 have been utterly illegal.

When Felton upon his Examination at the Council Board declared, as
 had always done, that no Man living had instigated him to the Murder of
 the Duke of *Buckingham* or knew of his Intention, the Bishop of *Lincoln*
 said to him, “ If you will not confess you *must go to the Rack*,” the Man
 replied, “ If it must be so, I know not whom I may accuse in the Extremity
 of the Torture, Bishop *Laud* perhaps or any Lord at this Board.”

Sound Sense in the Mouth of an Enthusiast and a Russian!
Laud having propos’d the Rack, the Matter was shortly debated at the
 Board, and it ended in a Reference to the Judges; who unanimously
 resolv’d, that the Rack cannot be legally used.

Rushworth.
 Whitlock.

1. St. Tri.
 * Coke.

OF HIGH TREASON.

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III.

is to answer upon the Spot, it enacteth "that no Evidence shall be admitted or given of any Overt-Act that is not expressly laid in the Indictment against any Person or Persons whatsoever." (*Sect. 8.*)

THE Sense of this Clause I take to be, that no Overt-Act amounting to a *distinct independent Charge*, though falling under the same Head of Treason, shall be given in Evidence, unless it be expressly laid in the Indictment; but still, if it amounteth to a direct Proof of any of the Overt-Acts that are laid, it may be given in Evidence of such Overt-Acts.

IN the Case of *Ambrose Rookwood* who was indicted 4. St. Tri. for compassing the Death of the King, two of the Overt-Acts charged were, that he and others met and consulted the proper Means for Way-laying the King, and attacking him in his Coach; and also that they agreed to provide forty Men for that Purpose. The Council for the Crown offered to give Evidence, that the Prisoner produced to one of the Conspirators a List of the Names of a small Party who were to join in the Attempt, of which he was to have the Command; with his own Name at the Head of the List as their Commander. This Evidence was opposed by the Prisoner's Council, because that Circumstance was not charged in the Indictment, and this Clause of the Act was much pressed. But the Court said that this Circumstance if proved, amounting to a direct Proof of the Overt-Acts that were laid, *viz.* the meeting and consulting how to kill the King and their agreeing to provide forty Men for that Purpose, and falling under the same Species of Treason, was very proper to be given in Evidence. And in Major *Lowick's* Case they declared, that if the Circumstance of providing forty Men had not been laid, it might notwithstanding have been given in Evidence. For it was a direct Proof of the first Overt-Act, *viz.* the meeting and consulting the proper Means to kill the King.

Ibid.

THE same Rule was laid down in the Case of Mr. *Layr*. His corresponding with the Pretender, though not laid, and though made Treason by the 12. and 13. of King *William*, was given in Evidence. For it directly tended to prove one Overt-Act that was laid, *viz.* His conspiring

C H A P. ring to depose the King and to place the Pretender on the
 III. Throne. The like Rule was given in the Cases of
 My Report. *Deacon* and Sir *John Wedderburn* upon the special Com-
 mission in *Surry* 1746.

5. St. Tri. ON the other Hand, in the Case of Captain *Vaughan*
 upon an Indictment for adhering to the King's Enemies
 on the High Sea, the Overt-Act laid was his cruising on
 the King's Subjects in a *Vessel called the Loyal Clencarty*:
 the Council for the Crown offered Evidence to prove that
 he had some Time before cut away the Custom-house
 Barge, and had gone a-cruizing in *her*. This Evidence
 was opposed by the Prisoner's Council, and after some
 Debate rejected by the Court. For were it true, it was
 no Sort of Proof that the Prisoner had cruized in *the*
Loyal Clencarty; which was the only Fact he was then
 to answer for.

THE Rule of rejecting all manner of Evidence in cri-
 minal Prosecutions that is foreign to the Point in issue, is
 founded on sound Sense and common Justice. For no
 Man is bound at the Peril of Life or Liberty, Fortune
 or Reputation, to answer at once and unprepared for
 every Action of his Life. Few even of the best of Men
 would choose to be put to it. And had not those con-
 cerned in state Prosecutions out of their Zeal for the
 publick Service sometimes stepped over this Rule in the
 Case of Treasons, it would perhaps have been needful
 to have made an exprefs Provision against it in that Case.
 Since the Common-Law grounded on the Principles of
 natural Justice hath made the like Provision in every
 other.

THE Clauses in the Act which do not fall under either
 of the Heads I have spoken to, come now to be con-
 sidered.

SECT. 10.

SECT. 10. THE 10th and 11th Sections make Provi-
 sion for a more equal and indifferent Trial of Peers and
 Peereffes in Cases of Treason and Misprision. The Mis-
 chief recited is, *that in the Trial of a Peer or Peerefs* THE
 MAJOR VOTE is sufficient for Condemnation or Acquittal;
whereas, saith the Act, in the Trial of a Commoner a Jury
of twelve Freeholders must all agree in their Verdict. I
 doubt this was not the real Mischief, because the Remedy
 itself

itself is open to the same. The *major Vote* is still sufficient and must be so; and if the Method of Trial in the Court of the Lord high Steward was in Contemplation, as I conceive it was, yet even there, though the major Vote is sufficient, the Majority must consist of *twelve or more*.

THE real Mischief cautiously passed over, I take to have been, that in the Trial of a Peer *in the Court of the High Steward*, the Peers Triers were a select Number returned at the Nomination of the high Steward, and the Prisoner was in every Case debarred the Benefit of a Challenge. This was the *real* Mischief, and it was in many Cases severely felt. Accordingly the Act applieth the proper Remedy, for it enacteth "that upon the Trial of a Peer or Peerefs for Treason or Misprision, all the Peers having Right to sit and vote in Parliament shall be summoned twenty Days before the Trial to appear and vote at such Trial. And every Peer so summoned and appearing shall vote *in the Trial of such* Peer or Peerefs" having first taken the Oaths appointed by the Act.*

THE next Clause provideth "That neither this Act nor any Thing therein contained shall any Ways extend or be construed to extend to any Impeachment or other Proceeding in Parliament in any Kind whatsoever." (Sect. 12.)

THE Words of the last Clause are very general, and seem to exclude every Proceeding in *full Parliament* for the Trial of a Peer in the ordinary Course of Justice. But that Construction was rejected in the Cases of the Earls of *Kilmarnock* and *Cromartie* and of the Lord *Balmorino*. And accordingly all the Peers and Lords Spiritual were summoned. And those Lords who appeared having taken the Oaths appointed by the Act, the Bishops upon the Day the Trial came on, after making the usual Protestation withdrew. And the Prisoners before their Arraignment were informed by the high Steward that they were intitled to the Benefit of this Act in its full Extent.

* See the Conference between the Lords and Commons upon this Clause in *Kennet's* 3^d Vol. p. 625. Both Houses plainly understood the Clause to refer to the Trial of a Peer in the Court of the Lord High Steward.

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III.

THE summoning the Lords spiritual to the Trial of those Lords was, I apprehend, a prudent Caution in order to obviate a Doubt that might otherwise at that critical Time have arisen from the Words of the Statute, which as I before observed are very general. But general as they are, I do not conceive that they made that Measure though extremely prudent, *absolutely and indispensibly* necessary. For general Words in a Statute must be controuled by the apparent Intent of the Legislature. They must in Construction be adapted to Cases then in Contemplation, and to every other Provision in the Statute, so as to render the Whole one uniform consistent Rule.

I will now in a few Words apply this Observation to the present Case.

THE Act provideth that every Peer so summoned and appearing shall vote *in the Trial*. By voting *in the Trial* must as I apprehend be meant voting *throughout the Trial*, voting as a competent Judge in every Question that shall arise during the Trial; and above all, in the grand Question for Condemnation or Acquittal. Now upon this last Question the Bishops cannot vote. Though it hath been resolved and Practice hath established the Rule, that in a Proceeding in full Parliament in a Case of Blood, they may, if they choose it, vote upon all *previous* Questions.* But in a Proceeding in the Court of the High Steward, which I conceive this Clause of the Statute had principally in Contemplation, and to which no meer spiritual Lord was ever summoned or could be, no Question but for Acquittal or Condemnation is the Subject of any Vote. For in all Points of Law or Practice the High Steward giveth the Rule as sole Judge in the Court.

To conclude this Head, the Act may with Propriety enough be said to regulate the Proceeding in both Courts, that of the High Steward and that in full Parliament; but it doth not alter the Nature and Constitution of either. Consequently, it doth not give the Lords spiritual any Right in Cases of Blood which they had not before. What Conclusions soever Men of Interloping busy Talents may

* See the Lords Journal 13. and 14. May 1679, in the Case of Lord *Danby* and the Popish Lords.

hereafter be tempted to draw from *it*, or from this Precedent. Which as I said before, is founded in great Wisdom for obviating Doubts which might have arisen; and proceeded from the same prudential Motives that the Acts I have already cited for saving the Rights of the Peerage did. The Measure in both Cases was extremely Right but not of absolute indispensable Necessity.

See Sect. 3.
of this Chapter.

SECT. 11. By the 5th and 6th Sections of the Act no Prosecution shall be for any of the Treasons or Misprisions within the Act, committed in *England, Wales, or Berwick upon Tweed*, unless the Bill of Indictment be found within three Years after the Offence committed; save in Cases of Assassination attempted on the Person of the King by Poison or other ways.

THIS Limitation is by the Letter of the Act confined to the southern Parts of *Great Britain*, and before the Union it could not be otherwise. But I conceive that by the general Tenor of the 7. *An.* it is extended to Treasons of the like Kind committed in *Scotland*: it was so understood at the Time of the Rebellion of 1715; and therefore after all the proceedings upon the special Commissions in *England* were over, another special Commission went into *Scotland* merely for the finding Bills of Indictment in the proper Counties and Stewarties, in order to prevent the Limitation's taking place.

SECT. 12. I will now consider the Clauses 7. *An.* which I before hinted at. The eleventh Section of that Act provideth that "when any Person is indicted for High Treason or misprision of Treason, a List of the Witnesses that shall be produced at the Trial for proving the said Indictment, and of the Jury, mentioning the Names, Profession and Places of Abode of the said Witnesses and Jurors, shall be given at the same Time that the Copy of the Indictment is delivered to the Party indicted. And that Copies of all Indictments for the Offences aforesaid with such Lists shall be delivered *ten Days* before the Trial, and in the Presence of two or more credible Witnesses."

SECT. 12.
7. *An.*

THIS

CHAP.
III.See 17. of the
King c. 39.

THIS Provision will, as the Case now stands, take Place upon the Death of the Pretender. Whether it may not be proper to postpone the Effect of it to the Death of his Sons, upon the same Motive that the Clause in this Act touching the Corruption of Blood upon an Attainder for High Treason hath been postponed to that Event; or indeed, whether it should be suffered to take Place at all, must be submitted to better Judgments. But some Objections have occurred to me which I will mention.

No Provision is made with regard to the Treasons not comprehended within the general Purview of the 7th of King *William* or by Name excepted out of it. The Words of the Act, "indicted for high Treason or "Misprision of Treason" are large enough to take in all Manner of high Treasons and Misprision of Treason, and undoubtedly they will be so understood. For this Act will be considered as one of those which merit a liberal Construction.

WHEN this Clause shall take place no high Treason or Misprision of Treason, *not even those concerning the Coin*, can possibly be tried in the Circuit, nor at the *Old Bayly* without great Delay and double Expence. For the Copy of the Indictment cannot be delivered before it is found by the Grand Jury; they make the Bill preferred to them an Indictment by finding it. And ten clear Days exclusive of the Day of Delivery and the Day of Trial, and of intervening *Sundays* which is the present Practice founded on the 7th of King *William*, will carry the Affair much beyond the Time allowed for any Assizes or ordinary Gaol Delivery in the Kingdom.

THE furnishing the Prisoner with the Names, Professions, and Places of Abode of the Witnesses and Jury, so long before the Trial, may serve many bad Purposes which are too obvious to be mentioned. One good Purpose and but one it may serve. It giveth the Prisoner an Opportunity of informing himself of the Character of the Witnesses and Jury. But this single Advantage will weigh very little in the Scale of Justice or sound Policy, against the many bad Ends that may be answered by it. However, if it weigheth any Thing in the Scale of Justice, the Crown is intitled to the same Opportunity of sifting the Character of the Prisoner's Witnesses.

EQUAL

What 64.3.c.
53. § 3

OF HIGH TREASON.

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III.

EQUAL Justice is certainly due to the Crown and the Publick. For let it be remembered that the Publick is deeply interested in every Prosecution of this Kind that is well-founded. Or shall we presume that all the Management, all the practising upon the Hopes or Fears of Witnesses lieth on one Side? it is true Power is on the Side of the Crown. May it for the Sake of the constitutional Rights of the Subject, always remain where the Wisdom of the Law hath placed it! But in a Government like ours and in a most changeable Climate, Power if in criminal Prosecutions it is but suspected to aim at Oppression, generally disarmeth itself. It raiseth and giveth Countenance to a Spirit of Opposition, which falling in with the Pride or Weakness of some, the false Patriotism of others, and the Sympathy of all, not to mention private Attachments and party Connections, generally turns the Scale to the favourable Side and frequently against the Justice of the Case.

END OF THE DISCOURSE ON
HIGH TREASON.

DISCOURSE III.

OF

HOMICIDE.

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INTRODUCTION

TO THE

DISCOURSE ON HOMICIDE.

I SHALL consider the Law touching Homicide under the following Distinctions.

It is either occasioned by Accident which human Prudence could not foresee or prevent.

OR it is founded in Justice.

OR in Necessity.

OR it is owing to a sudden Transport of Passion, which though the Benignity of the Law, is imputed to human Infirmary.

OR it is founded in Malice.

BEFORE I proceed to these Matters I think proper to premise a few Things.

1. IN every Charge of Murder, *the Fact of Killing being first proved*, all the Circumstances of Accident, Necessity, or Infirmary are to be satisfactorily proved by the Prisoner, unless they arise out of the Evidence produced against him: for the Law presumeth the Fact to have been founded in Malice, until the Contrary appeareth. And very right it is that the Law should so presume. The Defendant in this Instance standeth upon just the same Foot that every other Defendant doth: the Matters tending to justify, excuse, or alleviate, must appear in Evidence before he can avail himself of them.

2. IN every Case where the Point turneth upon the Question, whether the Homicide was committed willfully and maliciously, or under Circumstances justifying, excusing, or alleviating; the Matter of Fact, viz. *whether the Facts alledged by way of Justification, Excuse, or Alleviation are true*, is the proper and only Province of the Jury. But whether upon a Supposition of the Truth of Facts such Homicide be justified, excused, or alleviated, must be submitted to the Judgment of the Court. For the Construc-
tion

DISCOURSE II.

tion the Law putteth upon Facts stated and agreed, or found by a Jury is in this, as in all other Cases, undoubtedly the proper Province of the Court. In Cases of Doubt and real Difficulty it is commonly recommended to the Jury to state Facts and Circumstances in a special Verdict. But where the Law is clear, the Jury, under the Direction of the Court *in point of Law*, Matters of Fact being still left to their Determination, may, and if they are well advised always will find a general Verdict conformable to such Direction.

Ad Questionem Juris non respondent Juratores.

3. WHEN the Law maketh use of the Term *Malice* *aforethought* as descriptive of the Crime of Murder, it is not to be understood in that narrow restrained Sense to which the modern Use of the Word *Malice* is apt to lead one, a *Principle of Malevolence to Particulars*. For the Law by the Term *Malice* in this Instance meaneth that the Fact hath been attended with such Circumstances as are the ordinary Symptoms of a wicked, depraved, malignant Spirit.

IN the Case of an Appeal of Death, which was antiently the ordinary Method of Prosecution, the Term *Malice* is not, as I remember, made use of as descriptive of the Offence of Murder in Contradistinction to simple felonious Homicide. The Precedents charge that the Fact was done *Nequitèr & in Feloniâ*, which fully taketh in the legal Sense of the Word *Malice*. The Words *per Malitiam* and *Malitiose* our oldest Writers do indeed frequently use in some other Cases; and they constantly mean an Action flowing from a wicked and corrupt Motive, a Thing done *Malo Animo*, *Malâ Conscientiâ*, as they express themselves. Of which many Instances might be given. I will mention one or two.

THE Method of proceeding in antient Times in a Case of Robbery or Larceny where the stolen Goods were found upon the Defendant was, that if he alledged that he bought them of another whom he named and vouched to warranty, the Vouchee, if he appeared and entered into Warranty, was to stand in the Place of the Defendant *pro Bono & Malo*. *Brañon* speaking of this Matter saith, *Intrat quandoque in Defensionem & Warrantum aliquis Malitiosè & per Fraudem & per Mercedem, sicut Campio Conduclitius.* — *Fleta*, on the same Subject, after stating the Case of the

De Coronâ

cap. 32. S. 7.

Lib. 1. cap.

38. S. 8. 9.

quandoque in Defensionem & Warrantum aliquis Malitiosè & per Fraudem & per Mercedem, sicut Campio Conduclitius. — *Fleta*, on the same Subject, after stating the Case of the

the

the hired Champion in *Bracton's* Words, putteth another similar to it. A Person in Holy Orders entereth into Warranty for Hire, but refuseth to take his Trial before Lay Judges *propter Privilegium Clericale*. In this Case, saith he, the Warranty availeth nothing, "*Et Clericus Gaolæ pro Malitiâ committetur & redimatur.*"

THE Legislature hath likewise frequently used the Terms *Malice* and *Malitiously* in the same general Sense, as denoting a wicked, perverse, and incorrigible Disposition.

THE Statute *de Malefactoribus in Parcis* reciteth that 21. Ed. 17 those Trespassers did frequently refuse to yield themselves to Justice; "*Immo ad Malitiam suam exequendum & continuandum*" did fly or stand upon their Defence.

THE 4. and 5. *Pb. and M.* Enacted, "That if any c. 4. Person shall *Malitiously* counsel, hire, or command any Person to do any Robbery — and being arraigned shall stand mute of *Malice*." — The Word in both Parts of the Act plainly importeth in general a wicked, perverse, and incorrigible Disposition.

NUMBERLESS Instances of the like Kind might be produced, which I doubt not every attentive Reader hath observed. But these are sufficient.

IN the same Latitude are the Words *Malice aforethought* to be understood in the Statutes which oust Clergy in the Case of wilful Murder. The *Malus Animus*, which is to be collected from all Circumstances, and of which, as I before said, the Court and not the Jury is to judge, is what bringeth the Offence within the Denomination of wilful malicious Murder, whatever might be the immediate Motive to it; whether it be done, as the old Writers express themselves, "*Irâ vel Odio, vel Causâ Lucrî,*" or from any other wicked or mischievous Incentive.

AND I believe most, if not all the Cases which in our Books are ranged under the Head of *Implied Malice* will, if carefully adverted to, be found to turn upon this single Point, that the Fact hath been attended with such Circumstances, as carry in them the plain Indications of an Heart regardless of social Duty, and fatally bent upon Mischief.*

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I PRO-

* The Word *Malitia* is used in the same general Sense in the best Roman Authors and in the Civil Law. (See *Calvin's* Lexicon

DISCOURSE II.

I PROCEED now to the several Species of Homicide, as they fall under the Distinctions before mentioned.

CHAP. I.

Homicide occasioned by Accident which human Prudence could not foresee or prevent, improperly called Chance-medley.

THIS Species of Homicide is where a Man doing a lawful Act without Intention of bodily Harm to any Person, and using proper Caution to prevent Danger, unfortunately happeneth to kill. A Variety of Cases coming within this Description of Homicide involuntary and meerly accidental have been put by the Writers on the Subject, which it is not necessary for me to repeat in this Place. It will be of more general Service to state the several Restrictions and Limitations under which this Rule is to be considered, which will make the true Extent of it better understood.

SECT. I. IN order to bring the Case within this Description, the Act upon which Death ensueth must be lawful. For if the Act be unlawful, I mean if it be *Malum in se*, the Case will amount to Felony, either Murder or Manslaughter, as Circumstances may vary the nature of it. If it be done in Prosecution of a felonious Intention it will be Murder, but if the Intent went no further than to commit a bare Trespass, Manslaughter. Though I confess Lord Coke seemeth to think otherwise.

3. Inst. 56.

I DO not intend to enter into a long Detail of Cases falling within this Rule or any others that I shall lay down. I will content myself with a few plain Instances. For I have neither Leisure nor Inclination to give the Reader a Common-Place of what other Writers have said. My Design is, as far as I am able, to reduce every Subject I treat of to it's Principles; and the Cases I cite are intended meerly by way of Illustration.

Lexicon Jurid. or indeed any other approved Dictionary. Verb. *Malitia*.) But I think it much safer to consult our own Books for the Sense of Terms made use of in our Law. See Lord Raym. 1487. and Keil. 126, 127.

A. SHOOT-

A. SHOOTETH at the Poultry of *B.* and by Accident killeth a Man; if his Intention was to steal the Poultry, which must be collected from Circumstances, it will be Murder by reason of that felonious Intent; but if it was done wantonly and without that Intention it will be barely Manslaughter.

C H A P.

I.

Keil. 117.

6. St. Tri.

222.

THE Rule I have laid down supposeth that the Act from which Death ensued was *Malum in se*. For if it was barely *Malum prohibitum*, as shooting at Game by a Person not qualified by Statute-Law to keep or use a Gun for that Purpose, the Case of a Person so offending will fall under the same Rule as that of a qualified Man. For the Statutes prohibiting the Destruction of the Game under certain Penalties will not, in a Question of this kind, enhance the Accident beyond it's intrinsic Moment.

1. Hale 475.

SECT. 2. DEATH ensuing from Accidents happen-

SECT. 2.

ing at Sports and Recreations, *such Recreations being innocent and allowable*, falls within the Rule of excusable Homicide. Lord *Hale* indeed seemeth to be of Opinion,

1. Hale 472.

that Persons playing at Cudgels or Foils, or wrestling by Consent, if Death ensueth from a Blow, Push, or Fall given in those Exercises, ought to be excepted out of this Rule. This Opinion he groundeth upon a Principle very true when properly applied. But he seemeth in this Place, I speak it with great Deference, to be mistaken in the Application of it. "He, saith the learned Judge, that

and Sum. 57.

"voluntarily and knowingly intendeth hurt to the Person

"of a Man, though he intend not Death, yet if Death

"ensueth, it excuseth not from the Guilt of Murder or

"Manslaughter. As if *A.* intendeth to beat *B.* but not to

"kill him, and Death ensueth, it will be Murder or Man-

"slaughter as the Circumstances of the Case may happen."

If *A.* intendeth to beat *B.* in Anger or from preconceived

Malice, and Death ensueth, it will doubtless be no Ex-

cuse, that he did not intend all the Mischief that followed.

For what he did was *Malum in se*, and he must be an-

swerable for the Consequence of it. He certainly beat

him with an Intention of doing him some bodily Harm,

and had no other Intent, he could have no other; he is

therefore answerable for all the Harm he did. But is this

Case of Persons who in perfect Friendship engage by

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mutual

C H A P.
I.

mutual Consent in any of these Recreations for a Trial of Skill or Manhood, or for Improvement in the Use of their Weapons? Here is indeed the Appearance of a Combat, but it is in Reality no more than a friendly Exertion of Strength and Dexterity for the Purposes I have mentioned. And, which taketh the Case out of the general Rule laid down by the learned Judge, and entirely distinguisheth it from that he putteth by way of Illustration, *bodily Harm was not the Motive on either Side.* I therefore cannot call these Exercises unlawful; they are manly Diversions, they tend to give Strength, Skill, and Activity, and may fit People for Defence, publick as well as personal in Time of Need. I would not be understood to speak here of Prize-fighting and publick Boxing-matches, or any other Exertions of Courage, Strength and Activity of the like kind which are exhibited for Luere, and can serve no valuable Purpose; but on the contrary encourage a Spirit of Idleness and Debauchery. For these Disorders will, I conceive, fall under a quite different Consideration.

As to playing at Foils, I cannot say, nor was it ever said that I know of, that it is not lawful for a Gentleman to learn the Use of the small Sword; and yet that cannot be learned without practising with Foils. The learned Judge in the Passages last referred to citeth two Cases against this Exercise. The first is not particularly stated, and therefore I say nothing to it. The other, Sir *John Chichester's* Case, doth not in my Opinion conclude to the Point in Question. *For there was in Fact no playing at Foils in that Case.* Sir *John* passed at his Servant with his Sword in the Scabbard, he parried with a Bedstaff; and in the Heat of the Exercise the Chape of the Scabbard flew off, and the Servant was killed with the Point of the Sword. Sir *John* ought not to have used a deadly Weapon with so little Caution. The Chape was likely enough to be beaten off in the Violence of the Play, and if that should happen, Death, or some great bodily Harm must ensue. He did not use that Degree of Circumspection which common Prudence would have suggested. And therefore the Fact *so circumstanced* might well amount to Manslaughter, though the Exercise itself with proper Weapons might have been otherwise lawful.

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THE learned Judge mentioneth the Case of Publick Jousts and Tournaments without the Command of the King, as falling within the same Rule with the Exercises just mentioned; but the Cases differ greatly. For publick Jousts and Tournaments drew a great Concourse of high Spirits and warm Blood into the Field, *Assemblies not always consistent with the Publick Tranquillity, and seldom ending without some Bloodshed.* And for that Reason I presume it was that even in those Days of Chivalry they were deemed unlawful Assemblies, unless by special Licence from the Crown.

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I.

See Madox's
Baronia An-
glica Lib. 3.
c. 8.

A MAN at the Diversion of Cock-throwing at Shrovetide, which hath too long prevailed, missed his Aim; and a Child looking on received a Blow from the Staff, of which he soon died. I once in the Circuit ruled it Manslaughter. It is a barbarous unmanly Custom, frequently productive of great Disorders, dangerous to the By-standers, and ought to be discouraged.

SECT. 3. IF an Action unlawful in itself be done deliberately and with Intention of Mischief or great bodily Harm to Particulars, or of Mischief indiscriminately, fall it where it may, and Death ensue against or beside the original Intention of the Party, it will be Murder. But if such mischievous Intention doth not appear, which is Matter of Fact and to be collected from Circumstances, and the Act was done heedlessly and incautiously, it will be Manslaughter: not accidental Death, because the Act upon which Death ensued was unlawful.

SECT. 3.

UNDER this Head I will mention a Case which through the Ignorance or Lenity of Juries hath been sometimes brought within the Rule of accidental Death. It is where a Blow aimed at one Person lighteth upon another and killeth him. This in a loose way of speaking may be called accidental *with Regard to the Person who dieth by a Blow not Intended against Him.* But the Law considereth this Case in a quite different Light. If from Circumstances it appeareth that the Injury intended to *A.* be it by Poison, Blow, or any other Means of Death, would have amounted to Murder supposing *Him* to have been killed by it, it will amount to the same Offence if *B.* happeneth to fall by the

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I.

same Means. Our Books say that in this Case the Malice *Egreditur Personam*. But to speak more intelligibly, where the Injury intended against *A.* proceeded from a wicked, murderous, or mischievous Motive, the Party is answerable for all the Consequences of the Action, if Death ensueth from it, though it had not it's Effect upon the Person whom he intended to destroy. The *Malitia* I have already explained, the Heart regardless of social Duty and deliberately bent upon Mischief, and consequently the Guilt of the Party is just the same in the one Case as in the other. On the other Hand, if the Blow intended against *A.* and lighting on *B.* arose from a sudden Transport of Passion which in Case *A.* had died by it would have reduced the Offence to Manlaughter, the Fact will admit of the same Alleviation if *B.* should happen to fall by it.

SECT. 4.

SECT. 4. IT is not sufficient that the Act upon which Death ensueth be lawful or innocent, it must be done in a proper Manner and with due Caution to prevent Mischief. Parents, Masters, and other Persons having Authority in *Foro Domestico*, may give reasonable Correction to those under their Care; and if Death ensueth without their Fault, it will be no more than accidental Death. But if the Correction exceedeth the Bounds of due Moderation, either in the Measure of it or in the Instrument made use of for that Purpose, it will be either Murder or Manlaughter according to the Circumstances of the Case. If with a Cudgel or other Thing not likely to kill, though improper for the Purpose of Correction, Manlaughter. If with a Dangerous Weapon likely to kill or maim, due Regard being always had to the Age and Strength of the Party, Murder.

Comb. 408.

1 Hale 474.

Keil. 64, 133,
134.

THIS Rule touching due Caution ought to be well considered by all Persons following their lawful Occupations, especially such from whence Danger may probably arise.

WORKMEN throw Stones, Rubbish, or other Things from an House in the ordinary Course of their Business, by which a Person underneath happeneth to be killed; if they look out and give timely Warning beforehand to those below, it will be accidental Death; if without such Caution,

Caution, it will amount to Manslaughter at least. It was a lawful Act, but done in an improper Manner. * C H A P. I.

It is indeed said in *Keiling*, † that if this be done in the Streets of *London* or other populous Towns, it will be Manslaughter notwithstanding the Caution I have mentioned is used. But this will admit of some Limitation. If it be done early in the Morning, when few or no People are stirring, and the ordinary Caution is used, I think the Party is excusable. But when the Streets are full *That* will not suffice; for in the Hurry and Noise of a crowded Street few People hear the Warning or sufficiently attend to it. * 1. Hale 472, 475. † Keil. 40.

A Person driving a Cart or other Carriage happeneth to kill. If he saw or had timely notice of the Mischief likely to ensue, and yet drove on, it will be Murder. For it was wilfully and deliberately done. Here is the Heart regardless of social Duty, which I have already taken notice of. If he might have seen the Danger, but did not look before him, it will be Manslaughter for want of due Circumspection. But if the Accident happened in such a Manner that no Want of due Care could be imputed to the Driver, it will be accidental Death, and the Driver will be excused. 1. Hale 476.

I NEED not state more Cases by way of Illustration under this Head, these are sufficient. But I cannot pass over one Reported by *Keiling*, because I think it an extreme hard Case, and of very extensive Influence. A Man found a Pistol in the Street, which He had reason to believe was not loaded, *having tried it with the Rammer*; He carried it Home and shewed it to his Wife, and she standing before him he pulled up the Cock, and touched the Trigger. The Pistol went off and killed the Woman. This was ruled Manslaughter. Keil. 41.

It appeareth that the learned Editor was not satisfied with the Judgment. It is one of the Points he in the Preface to the Report recommendeth to further Consideration. Ch. J. Holt.

ADMITTING that the Judgment was strictly legal, it was, to say no better of it, *Summum Jus*.

I CANNOT help saying, that the Rule of Law I have been considering in this Place, touching the Consequence

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I.

Coronation
Oath.

of taking or not taking due Precaution, doth not seem to be sufficiently tempered with Mercy. Manslaughter was formerly a capital Offence, as I shall hereafter shew. And even the Forfeiture of Goods and Chattels upon the Foot of the present Law is an heavy Stroke upon a Man guilty 'tis true of an heedless incautious Conduct, but *in other Respects perfectly Innocent*. And where the Rigour of Law bordereth upon Injustice, Mercy should, if possible, interpose in the Administration. It is not the Part of Judges to be perpetually hunting after Forfeitures *where the Heart is free from Guilt*. They are Ministers appointed by the Crown for the Ends of publick Justice; and should have written on their Hearts the solemn Engagement his Majesty is under to "Cause Law and Justice *in Mercy* to be "executed in all his Judgments."

THIS I have said upon a Supposition that the Judgment reported by *Keiling* was strictly legal. I think it was not. For the Law in these Cases doth not require the *utmost* Caution that *can be used*; it is sufficient that a reasonable Precaution, what is *usual and ordinary* in the like Cases, be taken. In the Case just mentioned of Workmen throwing Rubbish from Buildings, the ordinary Caution of looking out and giving Warning by Outcry from above will excuse, though doubtless a better and more effectual Warning might have been given. But this excuseth, because it is what is usually given, and hath been found by long Experience in the ordinary Course of Things, to answer the End. The Man in the Case under Consideration examined the Pistol in the Common way, perhaps the Rammer which he had not tried before was too short and deceived him. But having used the ordinary Caution found to have been effectual in the like Cases he ought to have been Excused.

I HAVE been the longer upon this Case, because Accidents of this lamentable Kind may be the Lot of the wisest and the best of Mankind, and most commonly fall amongst the nearest Friends and Relations. And in such a Case the Forfeiture of Goods rigorously exacted would be heaping Affliction upon the Head of the afflicted, and galling an Heart already wounded past Cure. It would even aggravate the Loss of a Brother, a Parent, a Child, or Wife, if

such

such a Loss under such Circumstances is capable of Aggra- C H A P.
vation. I.

I ONCE upon the Circuit tried a Man for the Death of his Wife by the like Accident. Upon a *Sunday* Morning the Man and his Wife went a Mile or two from Home with some Neighbours to take a Dinner at the House of their common Friend. He carried his Gun with him hoping to meet with some Diversion by the way. But before he went to Dinner he discharged it, and set it up in a private Place in his Friend's House. After Dinner he went to Church, and in the Evening returned Home with his Wife and Neighbours, bringing his Gun with him, which was carried into the Room where his Wife was, she having brought it part of the Way. He taking it up touched the Trigger, and the Gun went off and killed his Wife, whom he dearly loved. It came out in Evidence, that while the Man was at Church, a Person belonging to the Family privately took the Gun, charged it and went after some Game; but before the Service at Church was ended returned it *loaded* to the Place whence he took it, and where the Defendant, who was ignorant of all that had passed, found it, to all Appearance as he left it. I did not inquire, whether the poor Man had examined the Gun before he carried it Home; but being of Opinion upon the whole Evidence, that he had reasonable Grounds to believe that it was not loaded, I directed the Jury that if *They* were of the same Opinion they should acquit him. and he was acquitted.

SECT. 5. ACCIDENTAL Death which happeneth SECT. 5.
without the Intervention of human Means induceth a Deodands.
Forfeiture which the Ignorance and Superstition of antient Times called a *Deodand*. These Forfeitures were part of the Casual Revenues of the Crown; and the Value, when found by the Coroner's Inquest, was put in Charge to the Sheriff, in order to be levied on the Ville where the Accident happened; and was paid into the Hands of the King's Almoner to be applied to pious Uses for the Soul of the Deceased.

THIS Forfeiture, which is not now applied to Superstitious Uses, is still Part of the Revenue of the Crown, unless
where

C H A P. where Lords of Franchises are intitled to it by Grant.
 I. For no Man can prescribe to it, or to the Goods of Felons
 1. Inst. 114. of themselves, or other Felons, or Outlaws happening
 1. Hale 419. within his Royalty.

I HAVE nothing to add to what other Writers have said touching Deodands more than to observe, that as this Forfeiture seemeth to have been originally founded rather in the Superstition of an Age of extreme Ignorance than in the Principles of sound Reason and true Policy, it hath not of late Years met with great Countenance in *Westminster-Hall*. And when Juries have taken upon them to use a Judgment of Discretion, not strictly within their Province, for reducing the *Quantum* of the Forfeiture, (I wish the Temptation to it was taken out of their way) the Court of King's Bench hath refused to interpose in Favour of the Crown or Lord of the Franchise.

It hath frequently interposed it's Authority as Sovereign Coroner in this Case, and also in the Case of Suicide, in *Favour of the Subject and to save the Forfeiture*, but will not do it in either Case *to his Prejudice*. And herein it proceedeth upon the same Principle of equitable Justice, that the Courts of *Westminster-Hall* constantly do in refusing to set aside a wrong Verdict given in *Favour* of the Defendant in a Criminal Case, or in an hard Action, though it is done every Day where a wrong Verdict goeth against him.

* *Geo. 2.*

IN the Case of the King * and *Rolfe* Coroner of *Kent*, which came on in *Mich. and Hill.* the 5th of King *Geo. 2.* the Coroner's Inquest found, that *A. B.* sitting on his Waggon accidentally fell to the Ground, and that the Horses drawing the Waggon forward, one of the Forewheels crushed his Head, of which he instantly died, and then concluded that the Wheel, on which they set a small Value, *only* moved to his Death. A Motion was made in behalf of Mr. *Mompesson* Lord of the Franchise for quashing this Inquisition, upon Affidavits tending to shew that the Cart and Horses were equally instrumental; which indeed the Finding of the Jury did sufficiently imply. But the Court was very clear that neither this Court nor the Coroner can oblige the Jury to conclude otherwise than they have done, and would not suffer the Affidavits

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for quashing the Inquisition to be read. A like Case came on in *Mich.* the 29th of King *Geo.* 2. the King against *Drew* Coroner of *Middlesex.* The Coroner's Jury upon view of the Body of a Person killed by the like Accident, found that one Wheel of the Waggon *only* moved to the Death. The Court, on Motion in Behalf of the Lord of the Franchise, granted a Rule for shewing Cause why the Inquisition should not be quashed for this Misbehaviour of the Jury. On the Day for shewing Cause Mr. *Hume Campbel*, Council for the Lord of the Franchise, informed the Court that upon looking into Precedents he was satisfied he could not support the Rule, and thereupon it was discharged. The Case of the King and *Rolfe* was mentioned on this Occasion, and greatly relied on.

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C H A P. II.

Homicide founded in Justice.

SECT. I. **T**HE Execution of Malefactors under Sentence of Death for capital Crimes hath been considered by former Writers as a Species of Homicide founded in Necessity. I think it hath with Propriety enough been so considered. For the Ends of Government cannot be answered without it, Lord *Hale* hath treated this Subject pretty much at large: and as it is not a Matter of very general Concernment, and as few Questions are likely to arise upon it, I refer the Reader to what the learned Judge hath said upon the Subject. One of his Rules indeed seemeth to want some Explanation; *That the Execution ought not to vary from the Judgment; for if it doth, the Officer will be guilty of Felony at least, if not of Murder.*

SECT. I.

1. Hale 496.
--- 502.

1. Hale 501.
2. Hale 411.

THIS is a good general Rule, but not universally true. If the Officer of his own Head, and without Warrant, or the Colour of Authority, varieth from the Judgment, he may be Criminal to that Degree the learned Author mentioneth. For he Wilfully and Deliberately acteth in Defiance of Law, and in so doing sheddeth the Blood of a Man, whose Person, 'till Execution is done upon him in a due Course of Justice, is equally under the Protection of

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3. Inst. 52,
211.

of the Law with every other Subject. But if the Officer hath a Warrant from the Crown for beheading a Person under Sentence of Death for Felony, or a Woman for Treason of any Kind, and payeth Obedience to it, this I conceive would not be criminal. Lord *Coke* indeed doth say that a Warrant from the Crown for an Execution *totally varying from the Judgment* is illegal, because the King cannot *alter* the Judgment, though he may by his Prerogative *remit* one Part, and leave the Offender open to the other. As, saith he, in the Case of High Treason, Decapitation *being Part of the Judgment*, the Law is satisfied, the Judgment is substantially executed, if that be done, though every other Part is omitted. And *Hale* seemeth to agree with Him.

THAT the Crown may remit Part of the Judgment is certainly true, and would silence every Doubt in the Case of High Treason at least, if hanging and beheading were Ingredients in every Judgment for that Offence. But in the Case of Women, beheading is no Ingredient in the Judgment, and yet Ladies of Distinction have been for many Ages past by Warrant from the Crown beheaded for that Offence. The Execution in this Instance *totally* varieth from the Judgment, and yet I do not know that those Executions have been esteemed illegal. Nor can I recollect a single Instance where a Lady of Distinction hath been burnt for High Treason. And with regard to those of inferior Rank who have been burnt, it is well known they have generally been strangled at the Stake by the Executioner before the Fire hath reached them; though the Letter of the Judgment is that they shall be burnt in the Fire *'till They are Dead*. This the Sheriff doth or knowingly permitteth without Warrant from the Crown, Custom alone having given a kind of Sanction to a Practice founded in Humanity and not repugnant to any Rule of substantial Justice. I remember one and but one Instance to the contrary which will be mentioned in it's proper Place. Beheading is likewise no Ingredient in the Judgment for Felony, and yet Persons of Distinction have for Ages past been by the like Warrants beheaded for that Offence; and Nobody hath complained or thought the Execution illegal.

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THE Distinction therefore between a total Alteration and a Remission of Part of the Judgment will not wholly solve the Difficulty, if any Difficulty there be. Though a partial Solution may sometimes serve to save Appearances. But this Matter seemeth to lie in a very narrow Compass. The King cannot by his Prerogative vary the Execution, so as to *Aggravate the Punishment beyond the Intention of the Law*. Thus far the Rule that the King cannot alter the Judgment is true. But it doth not follow from thence that he, *who undoubtedly can wholly pardon the Offender*, cannot mitigate his Punishment with Regard to the Pain or Infamy of it. Will it be said that because the Crown cannot go beyond the Letter of the Law *in point of Rigour* it's Mercy is likewise so bounded? by no Means. For the Law proceedeth in both Cases with a perfect Uniformity of Sentiment and Motive. The Benignity of the Law hath set Bounds to the Prerogative in one Case, and the same Benignity hath left it free and unconfined in the other.

IN the Cases just mentioned it cannot perhaps be said with strict Propriety that *the Judgment is substantially executed*; but surely the Ends of publick Justice are effectually answered if the Offender suffereth Death, the *Ultimum Supplicium*, though the Circumstances of Infamy or extreme Rigour which the Judgment importeth are dispensed with. And whenever that hath been done, it hath in all Ages been esteemed a Matter of Royal Grace, and granted at the Prayer of the Party or his Friends.

THE Writ of Escheat, grounded on the Common-Law, Regist. 165. in the Case of an Attainder for Felony alledgeth that the a. F. N. B. Party was hanged, whether, say the Books, *He was BE- 144. H. 4°* HEADED or died before Execution, which Averment is not Edit. 339. traversable. This, saith the Note on the Register, was Stanf. 198. A. adjudged in Parliament in the 8th of Edw. the 3^d. And in 9. Ed. 2. c. 10. the Statute stiled *Articuli Cleri* one Grievance complained of is, "That Persons flying to Sanctuary and abjuring" (a Privilege never allowed but in Cases of Felony) "had been taken by Force from the publick Highway and then hanged or Beheaded." Lord Coke in his Comment at the Word [*decapitantur*] saith, "This is mistaken in the Petition, for no Man can be beheaded but for Treason." The Mistake if any there be was in a meer Matter

CHAP. II. Matter of Fact of great and publick Notoriety at that Time. And therefore, where the Mistake upon the whole most probably lieth, whether in the Petition or in the Comment, the Reader must judge.

THESE Authorities, in my Opinion, prove to a Demonstration, that in those early Ages the Judgment for hanging was the legal ordinary Judgment in the Case of Felony, and that Execution was commonly done in that Manner. They shew likewise that beheading in some special Cases upon a Judgment in Felony hath been practised in all Ages.

I THEREFORE conclude, 'till I shall be better informed, that the Prerogative now under Consideration, founded in Mercy, and never in any Age complained of, is Part of the Common-Law.

3. Inst. 211.

LORD Coke in one of the Passages I have cited, after admitting that in the Cases he mentioneth the Execution did vary from the Judgment, concludeth, but "*Judicandum est Legibus non Exemplis.*" The Rule is true, but the Mistake lieth in the Application of it. For immemorial Usage founded in Mercy and never complained of is undoubtedly sufficient in this, as in every other Case, to determine what is or is not Part of the Common-Law.

SECT. 2.

SECT. 2. HOMICIDE in Advancement of Justice may likewise be considered as founded in Necessity. For the Ends of Government will be totally defeated, unless Persons can in a due Course of Law be made Amenable to Justice. And therefore where Persons having Authority to Arrest or Imprison, using the proper Means for that Purpose, are resisted in so doing, and the Party making Resistance is killed in the Struggle, this Homicide is justifiable. And on the other Hand, if the Party having Authority to arrest or imprison, using the proper Means, happeneth to be killed, it will be Murder in all who take a Part in such Resistance. For it is Homicide committed in Despite of the Justice of the Kingdom.

THE Rule I have laid down supposeth that Resistance is made. And upon that Supposition it will, I conceive, hold in all Cases, whether civil or criminal. For in the Case of Resistance in either Case the Person having Authority

thority to arrest or imprison may repel Force with Force, and if Death ensueth in the Struggle he will be justified. This is founded in Reason and publick Utility. For few Men would quietly submit to an Arrest, if in every Case of Resistance the Party impowered to arrest was obliged to desist and leave the Business undone. I think the Opinion in 1. Rolle's Report is too severe.

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f. 189.

SECT. 3. THE Case of bare Flight in order to avoid an Arrest in a civil Proceeding, and likewise in some Cases of a Criminal Nature, will fall under a different Consideration. A Defendant in a civil Suit being apprehensive of an Arrest flyeth, the Officer pursueth, and in the Pursuit killeth Him, *This, saith Lord Hale, will be Murder.*

SECT. 3.

1. Hale 481.

I RATHER choose to say, it will be Murder or Manslaughter as Circumstances may vary the Case. For if the Officer in the Heat of the Pursuit, and meerly in order to overtake the Defendant, should trip up his Heels, or give him a Stroke with an ordinary Cudgel, or other Weapon *not likely to kill*, and Death should unhappily ensue, I cannot think that this will amount to more than Manslaughter, if in some Cases even to that Offence. The Blood was heated in the Pursuit, his Prey, *a lawful Prey*, just within his Reach, and no signal Mischief was intended. But had he made use of a deadly Weapon, it would have amounted to Murder. The mischievous vindictive Spirit, the *Malitia* I have already explained, which always must be collected from Circumstances, determineth the Nature of the Offence.

SECT. 4. WHAT hath been said with Regard to bare Flight in a Proceeding meerly civil is equally true in the Case of a Breach of the Peace, or any other Misdemeanour short of Felony. But where a Felony is committed, and the Felon flyeth from Justice, or a dangerous Wound is given, it is the Duty of every Man to use his best Endeavours for preventing an Escape. And if in the Pursuit the Party flying is Killed, *where he cannot be otherwise overtaken*, this will be deemed justifiable Homicide. For the Pursuit was not barely warrantable, it is what the Law requireth

SECT. 4.

See the Case
of Guiscard.
Stat. 9 An.
c. 16.

1. Hale 489,
490.

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quireth and will punish the *wilful* Neglect of. I may add that it is the Duty of every Man in these Cases quietly to yield himself up to the Justice of his Country. And for this Reason it is that Flight alone upon a Charge of Felony induceth a Forfeiture of Goods, though the Party upon his Trial may be acquitted of the Fact. For he hath done what in him lay to stop the Course of publick Justice.

SOME Writers have thought that this Forfeiture is founded on a legal Presumption of the Guilt of the Party *grounded on his Flight*; but in the Case of an Acquittal all Presumption of that kind must be at an End. It is Presumption against Fact.

THESE Rules are founded in publick Utility, *ne Maleficia remaneant impunita*.

AND if in the Cases last mentioned the Felon, or Person giving a dangerous Wound turneth upon the Pursuers, and in the Scuffle any one of them is killed, this will be Murder in the Person so resisting, and all his Adherents present and knowingly abetting, for the Reason given in the second Section.

AND even in the Case of a sudden Affray where no Felony is committed or wound given, if a Person interposing to part the Combatants, *giving Notice to them of his friendly Intention*, should be assaulted by them or either of them, and in the Struggle should happen to kill, this, I take it, will be justifiable Homicide. And on the other Hand, if the Party so interposing, *giving such Notice*, should be killed by either of the Combatants, it will be Murder in the Person so killing. For it is the Duty of every Man to interpose in such Cases for preserving the Publick Peace and preventing Mischief.

THIS Rule is founded in the Principles of social Duty and political Justice.

Kell. 66,
115.

Stanf. 13.
2. Inst. 52.

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C H A P. III.

Homicide founded in Necessity.

SECT. I. **S**ELF-DEFENCE naturally falleth under the Head of Homicide founded in Necessity, and may be considered in two different Views. SECT. I.

IT is either that Sort of Homicide *Se & Sua defendendo* which is perfectly innocent and justifiable, or that which is in some Measure blameable and barely excusable. The Want of attending to this Distinction hath, I believe, thrown some Darknes and Confusion upon this Part of the Law.

THE Writers on the Crown-Law, who I think have not treated the Subject of Self-Defence with due Precision, do not in Terms make the Distinction I am aiming at, yet all agree that there are Cases in which a Man may without retreating oppose Force to Force, even to the Death. This I call justifiable Self-Defence, the justifiable Homicide.

THEY likewise agree that there are Cases in which the Defendant cannot avail himself of the Plea of Self-Defence without shewing that he retreated as far as he could with Safety, and then meerly for the Preservation of his own Life killed the Assailant. This I call Self-Defence culpable, but through the Benignity of the Law excusable.

IN the Case of justifiable Self-Defence the injured Party may repel Force with Force in Defence of his Person, Habitation, or Property, against one who manifestly intendeth and endeavoureth with Violence or Surprize to commit a known Felony upon either. In these Cases he is Keil. 128, not obliged to retreat, but may pursue his Adversary till he 129. findeth himself out of Danger, and if in a Conflict between them he happeneth to kill, such killing is justifiable.

THE Right of Self-Defence in these Cases is founded in the Law of Nature, and is not nor can be superseded by any Law of Society. For before Civil Societies were formed, one may conceive of such a State of Things
S though

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though it is difficult to fix the Period when Civil Societies were formed, I say before Societies were formed for mutual Defence and Preservation, the Right of Self-Defence resided in Individuals; it could not reside elsewhere. And since in Cases of Necessity, Individuals incorporated into Society cannot resort for Protection to the Law of the Society, that Law with great Propriety and strict Justice considereth them as *still in that Instance* under the Protection of the Law of Nature.

I WILL by way of Illustration state a few Cases which I conceive are reducible to this Head of justifiable Self-Defence.

WHERE a known Felony is attempted upon the Person, be it to rob or murder, here the Party assaulted may repel Force with Force, and even his Servant then attendant on him, or any other Person present may interpose for preventing Mischief; and if Death ensueth, the Party so interposing will be justified. In this Case Nature and social Duty cooperate.

A Woman in Defence of her Chastity may lawfully kill a Person attempting to commit a Rape upon her. The Injury intended can never be repaired or forgotten. And Nature to render the Sex amiable hath implanted in the Female Heart a quick Sense of Honour, *the Pride of Virtue*, which kindleth and enflameth at every such Instance of brutal Lust. Here the Law of Self-Defence plainly coincideth with the Dictates of Nature.

AN Attempt is made to commit Arson or Burglary in the Habitation; the Owner, or any Part of his Family, or even a Lodger with him may lawfully kill the Assailants for preventing the Mischief intended.* Here likewise Nature and social Duty cooperate.

Keil. 128.

IN *Marogridge's Case*, he upon Words of Anger between him and Mr. *Cope* threw a Bottle with great Violence at the Head of Mr. *Cope*, and immediately drew his Sword; Mr. *Cope* returned the Bottle with equal Violence.

Ibid. 129.

"It was," saith Lord *Holt*, "Lawful and Justifiable in Mr. *Cope* so to do. For," as he argueth a little after-

* See *Keil*. 51. a much stronger Case. Persons rudely forcing themselves into a Room in a Tavern against the Will of the Company in Possession, one of the Assailants is killed in the Scuffle, ruled justifiable Homicide. But Qu.

wards,

wards, "He that bath shewn that he bath Malice against
"another is not fit to be trusted with a dangerous Weapon
"in his Hand." CHAP. III.

IT was upon this Principle, I presume, and possibly too upon the Rule already laid down touching the Arrest of a Person who had given a dangerous Wound, that the Legislature in the Case of the Marquis *de Guiscard* who stabbed Mr. *Harley* sitting in Council, discharged the Party who was supposed to have given him the mortal Wound from all manner of Prosecution on that Account; and declared the Killing to be a *lawful and necessary Action*. 9. An. c. 16.

SECT. 2. I will now proceed to that Sort of Self-Defence which is culpable and through the Benignity of the Law excusable. And this Species of Self-Defence, I choose upon the Authority of the Statute of *Hen. the 8th*, 24. H. 8. c. 5. to distinguish from the other by the Name of Homicide *se Defendendo* upon *Chance-medley*. The Term *Chance-medley* hath been very improperly applied to the Case of accidental Death, and in vulgar Speech we generally affix that single Idea to it. But the antient legal Notion of Homicide by *Chance-medley* was when Death ensued from a Combat between the Parties upon a sudden Quarrel.* How upon the special Circumstances of the Case the Species of Homicide *se Defendendo* which I am now upon, is distinguishable from that Species of felonious Homicide which we call Manlaughter will be presently considered. 3. Inst. 55, 57. Keil. 67.

THE Difference between justifiable and excusable Self-Defence appeareth to me to be plainly supposed and pointed out by the Statute I have just mentioned. For after reciting, that it had been *doubted* whether a Person killing another attempting to rob or murder him under the Circumstances there mentioned should forfeit Goods and Chattels, "As," proceedeth the Statute, "Any other Person should do that by *Chance-medley* should happen to kill or slay any other Person *in his or their Defence*," it enacteth, that in the Cases first mentioned the Party killing shall forfeit nothing, but shall be discharged in *like manner as if he were acquitted of the Death*.

* See *Skene — De Verborum Significatione. Verb. Chaud-melle.*
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I WILL make an Observation or two upon this Act.

1. **THOUGH** it expressly provideth against a Forfeiture in the special Cases therein mentioned, *upon which*, saith the Preamble, *Doubts had arisen*, that expresse Provision doth not imply an Exclusion of any other Cases of justifiable Homicide which stand upon the same Foot of Reason and Justice. For the Statute was plainly made in Affirmance of the Common-Law, and to remove a Doubt that had been entertained in the Cases specially provided for.

2. Two Cases of Self-Defence are supposed. In the one a Forfeiture of Goods was incurred, in the other not. What therefore is the true Import of the Words *Self-Defence upon Chance-medley*, which the Statute useth as descriptive of that Offence which did incur the Forfeiture? Homicide *per Infortunium*, which hath been stiled Chance-medley, cannot possibly be meant, for in that Case the Party killing is supposed to have no Intention of hurt; whereas in the Case the Statute mentioneth he is presumed to have an Intention to kill or to do some great bodily Harm *at the Time the Death happened at least*, but did it for the Preservation of his own Life. The Word *Chance-medley* therefore, as it standeth in this Statute connected with Self-Defence, must be understood in the Sense Coke and Keiling, in the Passages already cited, say was the original Import of it, a sudden casual Affray commenced and carried on in Heat of Blood. And consequently *Self-Defence upon Chance-medley* must, as I apprehend, imply that the Person when engaged in a sudden Affray quitted the Combat before a mortal Wound given, and retreated or fled as far as he could with Safety, and then urged by meer Necessity killed his Adversary for the Preservation of his own Life.*

THIS Case bordereth very nearly upon Manslaughter, and in Fact and Experience the Boundaries are in some Instances scarce perceivable: but in Consideration of Law they

* It may be thought Time mispent to enter into an etymological Dispute touching the Term *Chance-medley*, since the Statute I have cited seemeth to have fixed the legal Notion of it. The Word *Medley* is derived from *Medleta*, *Messeta*, or *Messia*, barbarous Latin Terms which signified an Affray. And whether the Compound *Chance-medley* be written *Cbaud-medley* or *Cbaud-melle* an Affray in the Heat of Blood, or *Cbance-medley* a sudden casual Affray, the Difference in Point of Sense is very small. And if any there be, the Definition I have given of the Thing taketh in both. The Word is written both Ways in different Glossaries, all of established Reputation.

they have been fixed. In both Cases it is supposed that Passion hath kindled on each Side, and Blows passed between the Parties. But in the Case of Manslaughter it is either presumed that the Combat on both Sides hath continued to the Time the mortal Stroke was given, or that the Party giving such Stroke was not at that Time in imminent Danger of Death.

HE therefore who in the Case of a mutual Conflict would excuse himself upon the Foot of Self-Defence must shew, that before a mortal Stroke given he had declined any further Combat and retreated as far as he could with Safety: and also that he killed his Adversary through meer Necessity, and to avoid immediate Death. If he faileth in either of these Circumstances he will incur the Penalties of Manslaughter.

THE Authorities I shall cite will serve to explain these Principles, and in some Measure fix the Boundaries between the Cases of Manslaughter and excusable Self-Defence.

A. being assaulted by B. returneth the Blow, and a Fight ensueth. A. before a mortal Wound given declineth any further Conflict, and retreateth as far as he can with Safety, and then in his own Defence killeth B; this is excusable Self-Defence; though, saith Stanford, A. had given several Blows not mortal before his Retreat. 1. Hale 479. Stanf. 15.

BUT if the mortal Stroke had been first given, it would have been Manslaughter. Ibid.

THE Cases here put suppose that the first Assault was made upon the Party who killed in his own Defence. But as in the Case of Manslaughter upon sudden Provocations, where the Parties fight on equal Terms, all Malice apart, it mattereth not who gave the first Blow; so in this Case of excusable Self-Defence, I think the first Assault in a sudden Affray, all Malice apart, will make no Difference, if either Party quitteth the Combat and retreateth before a mortal Wound be given. But if the first Assault be upon Malice, which must be collected from Circumstances, and the Assailant, to give himself some Colour for putting in Execution the wicked Purposes of his Heart retreateth and then turneth and killeth, this will be Murder. If he had

C H A P.
III.
Keil. 58,
128.

killed without retreating it would undoubtedly have been so; and the Craft of flying rather aggravateth than excuseth, as it is a fresh Indication of the *Malitia* already mentioned, the Heart deliberately bent upon Mischief.

THE other Circumstance necessary to be proved in a Plea of Self-Defence is, that the Fact was done from meer Necessity, and to avoid immediate Death. To this Purpose I will cite a Case adjudged upon great Deliberation. It was the Case of one *Nailor*, which came on at *O. B.* in *Apr.* 1704, before *Holt, Tracy, and Bury*.

MSS. Tracy
and Denton.

THE Prisoner was indicted for the Murder of his Brother, and the Case upon Evidence appeared to be, that the Prisoner on the Night the Fact was committed came home drunk. His Father ordered him to go to Bed, which he refused to do; whereupon a Scuffle happened betwixt the Father and Son. The Deceased, who was then in Bed, hearing the Disturbance got up, and fell upon the Prisoner, threw him down, and beat him upon the Ground; and there kept him down, so that he could not escape, nor avoid the Blows. And as they were so striving together the Prisoner gave the Deceased a Wound with a Penknife, of which Wound he died.

THE Judges present doubted, whether this was Manslaughter or *se defendendo*, and a special Verdict was found to the Effect before set forth.

AFTER *Michaelmas* Term, at a Conference of all the Judges of *England*, it was unanimously held to be Manslaughter. For there did not appear to be *any inevitable Necessity so as to excuse the Killing in this Manner*.*

* The Deceased did not appear to aim at the Prisoner's Life, but rather to chastise him for his Misbehaviour and Insolence towards his Father.

CHAP. IV.

HAVING considered the Cases of Homicide justifiable and barely excusable, I will submit to the Judgment of the Learned what hath occurred to me touching the Behaviour of the Petit Jury, and what Verdict they are to give in those Cases, and likewise upon criminal Prosecutions in the Cases of Infancy and Insanity.

SECT. 1. THOUGH the Jury may, and have been formerly directed in the Cases of Infancy and Insanity to find the special Matter, whereupon the Court is to give Judgment of Acquittal, yet, *under the Direction of the Court*, they may find a general Verdict of Acquittal without this Circuity. SECT. 1. 1. Hale 28. 2. Hale 303.

THIS Rule is founded in sound Reason and substantial Justice. For undoubtedly *Crimen non contrahitur nisi Voluntas nocendi intercedat*.

SECT. 2. IN all Cases of justifiable Homicide, which have been already considered, the antient Practice was to find the special Matter, and to leave the Court to give Judgment of Acquittal. But the later Authorities agree that in these Cases the Jury may, *under the Direction of the Court*, find a general Verdict of Acquittal. For, say the Books, here is neither Felony nor Forfeiture. This Rule is likewise founded in sound Reason and substantial Justice, for *Crimen non contrahitur*, &c. SECT. 2. 3. Inst. 220. 1. Hale 492. 2. Hale 303, 304.

SECT. 3. IN the Case of Homicide by Misadventure, improperly stiled *Chance-medley*, it hath been generally holden, that the Jury ought not to find a general Verdict of Acquittal, but should find the special Matter and submit the whole to the Judgment of the Court. In this Rule the modern Writers agree with the antient, unless *Hale* for the Reason I shall mention presently, may be excepted. For this two Reasons have been assigned. SECT. 3.

1. THE Jury are Judges of the meer Matter of Fact, and the Court is to judge upon the special Matter found by

C H A P. by them, whether the Fact was done *per Infortunium* or
IV. feloniously.

2. THOUGH in this Case no Felony is committed, yet the Party at Common-Law did forfeit his Goods, and must expect the King's Grace under the Statute of *Gloucester*, to restore them.

I AM very free to confess, that I am not at all satisfied with either of these Reasons. That the Matter of Fact is the proper Province of the Jury I have already premised, and will never depart from it. But it was never said that a Jury may not, *under the Direction of the Court*, very properly find a general Verdict comprehending both Law and Fact. Every general Verdict, in whatsoever Case it is given, doth so. It is now admitted that they may, *under the Direction of the Court*, give a general Verdict in all Cases of justifiable Homicide; and why not in the Case of Misadventure? a Point seldom so complicated and embarrassed as the other.

2. Hale 302.
— 304.

LORD Hale having at large considered the Question touching the Verdict as well in the Cases of excusable as justifiable Homicide, not I doubt with his usual Precision, nor with perfect Uniformity of Sentiment, concludeth thus, "Notwithstanding this that I have said, where the
" Matter itself appeareth *not to be Felony* the Prisoner upon not guilty pleaded may be found not guilty without
" finding the special Matter." I dare not say that his Lordship intended to bring the Case of Misadventure, which he had mentioned before in this Passage, and doth not now except, within this general Rule; because in the Passages cited above, and in others that might have been cited, he delivereth a contrary Opinion. But certainly the Rule as laid down by him is large enough to comprehend it. For in that Case it is admitted on all Hands, and cannot be gainsaid, that no Felony is committed.

GENERAL Verdicts have been taken upon great Consideration in Cases of Misadventure, particularly in *Pretty's* Case, and in one at the *Old Bayly* in December 1689. But it must be observed that in those Cases the Coroner's Inquest had found the special Matter and concluded *per Infortunium*; which Presentments the Defendants confessed upon Record, in order to their suing out their Pardons under the
Statute

1. Hale 476.
2. Hale 303.
MS. Denton.

Statute of Gloucester. Whether that Circumstance altered the Case in Point of substantial Justice will be presently considered. C H A P. IV.

THE second Reason against a general Verdict of Acquittal in the Case seemeth to be founded upon a gross Mistake, that at Common-Law he that killed a Man per Infortunium or se Defendendo was to be hanged and forfeit his Goods; and that the Statute of Gloucester though it saved his Life, yet left his Goods to the Mercy of the Crown.

THIS Doctrine is laid down in the Year-Book of *Edw.* 3. and in some other Places. And some learned Men,* 21. *Edw.* 3. 17 b. not sufficiently attending to the special Import of the Term Murder, as it is used in the Statute of *Marlbridge*, nor to the Occasion of making that Statute, have adopted it.

THE Statute of *Marlbridge* runneth thus, "Murdrum de cætero non adjudicetur coram Justiciariis, ubi per Infortunium adjudicatum est, sed Locum habeat Murdrum de Interfectis per Feloniam tantum, & non aliter."

By the Term *Murdrum*, as it standeth here, is not meant the Offence, but an Amerciament antiently exacted from the Township, where a Person was privately murdered, and the Murderer not apprehended; or the dead Body of an unknown Person appearing to have been murdered happened to be found. This Amerciament they called *Murdrum*. † See Spelm. Verb. Englesheria.

BRACTON, who wrote before the Statute of *Marlbridge*, spendeth a whole Chapter upon the Subject, and stateth a Variety of Cases, in which the Township was excused from this Burden. I will mention one, because it letteth us into the true Sense of the Statute, and also into the Occasion of making it. "Item de iis qui Mortui sunt *per*" De Coron. c. 15. §. 6.

* *Stanf. Prærog.* 45. *Placit. Cor.* 16. C. *Coke* on the Stat. of *Marlbridge* c. 26, and on the Stat. of *Gloucester* c. 9.

† In this Sense the Word is used in the Charters of *Hen.* 1. and *K. Stephen*; which the Reader will meet with in Mr. *Blackstone's* excellent Discourse introductory to his *Magna Charta*.

The Charter of *Hen.* 1. runneth thus, "Murdra etiam retro ab illo Die quo in Regem coronatus fui OMNIA condono. Et ea quæ amodo facta fuerint justè emendentur secundum Legem Regis Edvardi."

King *Stephen's* is thus, "Omnes Exactiones & Injustitias--- funditus extirpo. Bonas Leges & antiquas & justas Consuetudines in Murdris & Placitis---observabo & observari præcipio."

It cannot be understood in any other Sense in antient Charters of Exemption to Cities, Towns and other aggregate Bodies, "*Quæti sint de Murdro.*"

C H A P. IV. “ *per Infortunium nullum erit Murdrum, licet in quibus-*
 “ *dam Partibus DE CONSUETUDINE aliter observetur.*”

The Reader here seeth, that at Common-Law no Amerciament, to which they gave the Name of *Murdrum*, was due in Case of Death *per Infortunium*, but that in *some Places a contrary Custom had prevailed*. The Statute therefore did not correct the Rigour of the Common-Law, as the learned Authors just cited conceived. It's only View was to extend a Rule of Law founded on natural Justice to those Parts of the Kingdom, where a contrary Custom had prevailed. This clearly accounteth for the Word *de cætero*, which, together with the annexing a wrong Idea to an equivocal Expression, led those Authors into their Mistake.

It is difficult to conceive upon what Principles the Court delivered the Opinion I have stated from the Year-Book of *Edw. 3.*; since it would be a Reproach to the Justice of the Kingdom to imagine that the Law ever proceeded upon a Principle so repugnant to Nature, to Reason, and to the common Sense and Feeling of Mankind.

BUT the Common-Law never did lie under this Reproach. For nothing is plainer than that no Man was in Danger of a capital Punishment in Case of Death by Misadventure or *se Defendendo*, or in any Case where the Fact was not feloniously done.

De Coron.
c. 4.

BRACTON, speaking of the Case of Homicide *se Defendendo*, saith, “ *Non tenetur ad Pœnam Homicidii.*” And of Homicide *per Infortunium*, “ *Non imputatur ei.*”

c. 17.

And again speaking of the same Case, “ *Absolvi debet, quia Crimen non contrahitur nisi Voluntas nocendi intercedat;*” and he there compareth the Case to that of an Infant or Madman, as standing clearly upon the same

Lib. 1. c. 23.
S. 14, 15.

Foot of Reason and Justice. *Fleta* speaking of the Case of Self-Defence useth Expressions of the like Import; *Justi*, saith he, *interficiunt*. And even the Statutes of *Marlbridge* and *Gloucester* plainly intimate that at Common-Law no Felony was supposed to be committed. The Words of the former I have already cited; the latter expresseth the Matter thus, “ *Par Misadventure ou soy defend, ou en autre Manner SANS FELONY.*” And the Pardons hereafter cited from the Patent Rolls are express to the same Purpose.

BUT

BUT it is said that though the Statute of *Gloucester* saved the Life of the Party, it left the Forfeiture of his Goods, incurred at Common-Law, to the Mercy of the Crown. The Mercy of the Crown, or the King's Grace, or Words of the like Import serving to impress on the Mind a due Reverence for the regal Character, no good Subject can object to. This Statute speaketh in still an higher Strain. "The King will take him to his Grace, *if it pleaseth him.*" But it must not be concluded from this Manner of Expression, "*if it pleaseth him,*" that the Pardon grounded on the Statute is a Matter of meer Grace grantable or not at the Pleasure of the Crown, though some of the older Writers thought it was. For it is now a settled Point, and long hath been, that the Pardon issueth of Course, and *ex Debito Justitiæ*, the Requisites of the Statute being performed. And the Author of *Fleta* who flourished about the Time the Statute was made, seemeth to consider the royal Grace as a Matter founded rather in common Right than in meer Will and Pleasure. For speaking of the Statute he saith, "*Et cum Regi super Facti Veritate certioretur, Gratosè dispensabit cum tali, salvo Jure cujuslibet.*"

Stanf. Præ-
rog. 45. b.

See Coke on

the Statute.

Lib. 1. c. 23.

S. 15.

IN my Opinion the true Scope and Intent of this Statute hath been greatly mistaken. It hath been considered as a Law intitling the Subject to the Grace of the Crown in Cases of Homicide by Misadventure or *se Defendendo*, to which he was not before intitled; but the Fact appeareth to me to be quite otherwise. For the Subject had in these Cases the Benefit of the royal Grace long before the making of this Statute; as appeareth by many antient Charters of Pardon,* in which the King reciting that it appearing to him, sometimes upon the Representation of Persons *Fide dignorum*, at other Times by the Certificate of the Sheriff and Coroners of the County where the Fact was committed, that it was done in the necessary Defence of the Party, & *non per Feloniam aut Malitiam excogitatam* concludeth, "*Nos ergo Pietate moti perdonavimus prædicto*" A. B. *Secundam Pacis nostræ quæ ad Nos pertinet pro Morte prædictâ, & firmam Pacem ei inde concedimus. Ita tamen*

* See the Patent Rolls in the Time of H. 3. and Edw. 1. anterior to the Statute of *Gloucester*.

C H A P. IV. “ *quod fiet recto in Curia Nostra si aliquis versus eum inde loqui voluerit.*”

THIS last Clause saved to the Relations of the Party deceased their Remedy by Way of Appeal of Death, or, to speak more properly, recognized the Subject's Right to this Method of Prosecution; and is I presume what *Fleta* in the Passage just cited meaneth by the Words, *Salvo Jure cujuslibet.*

THE royal Grace in these Cases seemeth to me to be founded in the Benignity of the Common-Law, and to have been specially regarded in framing the Coronation Oath, which was nothing more than a Recognition of the constitutional Rights of the Subject and a solemn Engagement on the Part of the Crown to maintain them. The Words, as the Oath standeth at present, I have already cited: and Words of the like Import were inserted in that antiently taken by our Kings, importing that Mercy as well as Justice is one of the constitutional Attributes of the Crown. And I the more readily give into this Opinion, by Reason of the Provision made by the Statute of *Edw. 3.* 3. when the Frequency of Pardons from the Ease with which they were obtained was considered as a publick Mischief. “ No Pardon shall be granted for Manslaughters —and other Trespasses against the Peace, but where the King may do it *by his Oath*, viz. where a Man slayeth another *in his own Defence or by Misfortune.*” These Words * expressly referring to the Coronation Oath seem to imply that in the excepted Cases, Mercy was due of common Right. Sure I am it is founded in natural Justice.

BUT the Mercy of the Crown in Cases of Homicide was liable to great Abuse. The King was sometimes misled by a false or partial Representation of Facts, against which Abuse the Statute of *27. Edw. 3.* was levelled. The Abuse the Statute of *Gloucester* probably had in Contemplation was the careless or partial Manner in which the Sheriff and Coroners executed the Writ *de Odio & Atia.*

THIS Writ was founded on the Common-Law, and was rendered more effectual by the Great Charter, which provided that it should issue *Gratis* and of course without

* See *4. Edw. 3. 13. 10. Edw. 3. 3. 14. Edw. 3. 15.* Words of the like Import referring to the Coronation Oath.

Fine to the King. Upon the Return of this Writ, if it appeared either that the Party was acquitted by the Inquest, or that the Fact was done by Misadventure or *se Defendo*, the Writ *de ponendo in Ballium* issued of COMMON RIGHT. But the Sheriff and Coroners were no longer thought worthy of a Trust of this high Importance, which they had probably abused. And therefore in order to vest it in the Justices Itinerant, who generally were at the Head of the Profession, and with that View alone as I conceive, was this Branch of the Statute made. Not to intitle the Subject to the royal Grace in Cases in which he was not admissible to it before, as hath been imagined; but to remedy some Inconveniencies, which had been seen and felt in the Method of admitting him to it.

To that End the Statute enacteth, “ that from thence-
“ forth no Writ shall issue for the Death of a Man to in-
“ quire whether he was slain by Misfortune or *se Defen-*
“ *dendo*, or in any other Manner *without Felony*. But the
“ Party accused shall remain in Prison ’till the coming of
“ the Justices Errants or assigned to deliver the Gaol. And
“ if it be found by the Country that he did it in his own
“ Defence or by Misadventure, *the Justices* shall certify
“ the same to the King who will take him to his Grace,
“ &c.”

THIS was plainly pointed at the Writ *de Odio & Atiâ*, and abolished it. And in the Room of the Return made to that Writ by the Sheriff and Coroners substituted the Certificate of the Justices in Eyre. And this I apprehend was all it did in regard to that Matter.

LORD Coke indeed doth say that the Writ *de Odio & Atiâ* was taken away by the 28. *Edw.* 3. but in his Comment on the Statute now under Consideration he admitteth that it was restrained by this Statute, and *another Remedy provided*. And whoever will read the 28. *Edw.* 3. with Attention, will see that That Act was levelled at an Abuse of quite another Kind.

IN treating this Subject I have in Conformity to the Language of Writers who have gone before me, and to the Stile of the Statute of *Gloucester*, spoken of the Cases of Homicide *per Infortunium* or *se Defendendo* as Cases standing in need of the Grace of the Crown, though probably intitled

C H A P.
IV.
See Coke on
Mag. Ch.
c. 26.

Stat. Glouc.
c. 9.

Mag. Ch.
c. 26.

c. 9.

C H A P.
IV.

P. 58.

Fitz. Cor.
287.

intituled to it of common Right. That Persons who in either Case had been unhappily instrumental in Homicide did sue out Charters of Pardon, as well before as since the Statute, cannot be denied. What was the peculiar Object of the royal Grace in these Cases is not I confess so clear to me. I am satisfied that the Life of the Party was never in Danger, and consequently as to Life he could not be considered as an Object of royal Clemency, and standing in Need of a Pardon. It hath been generally thought that at Common-Law the Party incurred a Forfeiture of *all his Chattels*. And *Keiling* hath given us a short Note of a Case from *Fitzherbert* in the 3. *Edw.* 3. which, *as he citeth it*, would lead one to think that the Law at that Time undoubtedly was so. His Words are, "The Jurors were amerced for putting an Undervalue upon the Goods of a Man who had killed another in his own Defence." This Case so cited strongly implieth that in every Case of Homicide *se Defendendo* the Party forfeited *all his Goods*; otherwise why was the Jury charged with the Value of them, or amerced for their Misbehaviour with Regard to the Appraisement? But *Fitzherbert* goeth much further into the real State of the Case, and at the same Time letteth us, I conceive, into the true Ground of the Forfeiture. The Defendant after he had killed the Assailant fled for it, "Ideo," saith the Book, "*Catalla ejus confiscantur pro Fugâ.*"

FITZHERBERT hath reported some other Cases where the Parties incurring this Forfeiture had fled from Justice. And in the Case standing next before that cited by *Keiling*, and happening in the same Year, the Reporter after saying that the Party was remanded to Prison *ad Gratiam Regis expectand;* addeth, "*Et postea compertum est per Rotulos Coronatorum quod prædictus G. fugit, Ideo Catalla ejus confiscantur pro Fugâ.*" He was remanded to Prison, as the Practice then was, appearing then to be intitled to the Benefit of the Statute of *Gloucester*. But it afterwards appearing that he had fled from Justice, his Goods were *Therefore*, for his Flight, confiscated.

FLIGHT it is well known at this Day induceth a Forfeiture of Goods, though the Party should be wholly acquitted of the Fact. And by the antient Law a Felon killed

in the Pursuit upon Hue and Cry forfeited in like manner, "*Quia*", as the old Books have it, "*Paci Regis reddere*" C H A P. IV.
 "*se recusavit. Quia per Legem non permisit se Justiciari.*" Fitz. Cor.

I SUBMIT it to the Consideration of the Learned, whether in Cases of Homicide *per Infortunium* or *se Defendendo* 290.
 a Forfeiture of the whole was ever incurred. For in the

early Ages nearest the Conquest, when our Law was as it were in a State of Infancy, and had not received the Improvements it did during the Reign of *Edw. 1.* and in some succeeding Reigns, the Manslayer paid to the Crown by Way of Compensation for the Loss of a Subject a Mulct or Fine, sometimes in Money, at other Times in Horses, Hounds, Hawks, and other valuable Effects. This I call a Mulct or Fine, unless we may suppose that those Payments were made and accepted in Lieu of and as a Composition for the whole, which I leave to further Consideration.*

IT is well known to the Learned, that the *Anglo-Saxons* in Conformity to a Custom they and other Nations of *German* Extraction derived from their Ancestors, in Case of Homicide contented themselves with a pecuniary Compensation, which they called the *Wergild*, the Price of Blood. See Tacitus *de Moribus Germanorum*.

This when it came to be ascertained by Law was estimated in Proportion to the Rank and publick Character of the Deceased, the Crown in Consideration of the Loss of a Subject, and the Lord for the Loss of his Vassal coming in for a Share of it with the Family, which likewise had suffered a Loss in the Death of its Chief.

THE Community was supposed to have an Interest, as it really had, in the Life of every Member. And therefore the King as *Caput Reipublicæ* might exact a certain Mulct or Fine in Cases of Homicide, though merely casual. † Upon this Principle Deodands became due. The Weapon with which the Party was slain by another was a Deodand. Irrational Creatures, and even inanimate Beings, which without the Intervention of human Means contributed

* See *Madox's History of the Exchequer*. Chap. 14. S. 6. Some Traces of these Payments.

† See the *Saxon Laws* throughout, with the *Laws of the Conqueror* and *Hen. 1.* and the Glossaries. Verb *Freda*, *Wergild*, *Manbote*.

And see *Montesquieu's Spirit of Laws*. Lib. 30. c. 19, 20. The like Usages among the *Franks* and other Nations of *German* Extraction.

C H A P. buted to the Death were Deodands, and are so to this Day.
IV. And upon the same Principle the Crown shared with the Family in the Amerciament called *Murdrum* already mentioned.

BUT I will travel no further in a dark and almost untrodden Path.

I HAVE neither Leisure nor Inclination to enter deeply into the Search of Antiquity touching these Matters. The few Things I have thrown out I offer as probable Conjectures, Hints which possibly may afford some little Light to those who have more Leisure and better Health for such Inquiries.

FOR I think it is now become a Matter rather of historical Amusement than of real Importance to inquire, whether any Forfeiture in the Case of Homicide *se Defendendo* or *per Infortunium* was incurred at Common-Law or no. Since the Statute of *Gloucester* intitleth the Party to the royal Grace and hath purged the Forfeiture *ab Initio*, if any Forfeiture was ever incurred.

I THEREFORE think those Judges who have taken general Verdicts of Acquittal in plain Cases of Death *per Infortunium*, (justifiable Self-Defence hath been already spoken to) have not been to blame. They have, to say the worst, deviated from antient Practice in Favour of Innocence, and have prevented an Expence of Time and Money, with which an Application to the Great Seal, though in a Matter of Course, as this undoubtedly is, must be constantly attended.

Nulli vendemus, nulli negabimus, aut differemus Rectum aut Justitiam.

AND if it deserveth the Name of a Deviation, it is far short of what is constantly practised at an Admiralty-Sessions under the 28. *H. 8.* with regard to Offences not ousted of Clergy by particular Statutes,* which had they been committed at Land would have been intitled to Clergy. In these Cases the Jury is constantly directed to acquit the Prisoner; because the Marine-Law doth not allow of Clergy in any Case. And therefore in an Indictment for Murder on the High-Sea, if the Fact cometh out upon Evi-

* Statutes ousting Clergy are 11, 12. *W. 3. c. 7.* 4. *Geo. 1. c. 11.* 8. *Geo. 1. c. 24.* and perhaps some others.

dence to be no more than Manslaughter supposing it to have been committed at Land, the Prisoner is constantly acquitted.

C H A P.
IV.

SECT. 4. I AM not so clear with Regard to that Species of Self-Defence, which I have already considered as barely excusable. *Braſton* and *Fleta* indeed, in the Passages I have cited, speak of Self-Defence in general Terms, not accurately distinguishing between that which is justifiable and that which is barely excusable. But in the then infant State of our Law some Inaccuracy of Expression and a Want of due Precision in the Arrangement of Ideas may be expected, and ought to be candidly excused; though it must be confessed that in the Scale of sound Reason and substantial Justice the Cases widely differ. In the Former the Party is entirely innocent, he hath gone no further than Nature leadeth, no further than Duty founded on the great Law of Self-Preservation, will carry the wisest and the best of Men. In the Latter he may be considered as blame-worthy, having by his own Indiscretion and inordinate Heat brought upon himself the Necessity under which he excuseth the Fact; and though not a Felon, yet, in the Estimation of the Law which looketh with a jealous Eye on every Action which tendeth to Bloodshed and the Disturbance of the Peace of Society, far from an innocent Man. In short, as I have already observed, his Case is sometimes attended with Circumstances so bordering upon and not easily distinguishable from that Species of felonious Homicide which we call Manslaughter, that he may with Propriety enough be considered as an Object of the King's Grace within the Restrictions of the Statute of *Gloucester*, and consequently not intitled to a general Verdict of Acquittal.

SECT. 4.

C H A P. V.

Manſlaughter.

I NOW proceed to that Species of felonious Homicide which we call Manſlaughter, which, as I before obſerved, the Benignity of our Law as it ſtandeth at preſent imputeth to human Infirmit; to Infirmit which though in the Eye of the Law criminal, yet is conſidered as incident to the Frailty of the human Frame.

THE Caſes falling under the Denomination of Manſlaughter, where Death enſueth from Actions in themſelves unlawful, but not proceeding from a felonious Intention, or from Actions in themſelves lawful, but done without due Care and Circumſpection for preventing Miſchief, have been already conſidered under the Title of accidental Death. And the Diſtinction between Manſlaughter and excuſable Self-Defence hath been attempted in it's proper Place.

THE Caſes falling under the Head of Manſlaughter, which moſt frequently occur, are thoſe where Death enſueth upon a ſudden Affray and in Heat of Blood, upon ſome Provocation given or conceived.

I HAVE already premiſed, that whoever would ſhelter himſelf under the Plea of Provocation muſt prove his Caſe to the Satisfaction of his Jury. The Preſumption of Law is againſt him, 'till that Preſumption is repelled by contrary Evidence. What Degree of Provocation, and under what Circumſtances Heat of Blood, the *Furor brevis*, will or will not avail the Defendant is now to be conſidered.

SECT. I. **SECT. I.** WORDS of Reproach, how grievous ſoever, are not a Provocation ſufficient to free the Party killing from the Guilt of Murder. Nor are indecent provoking Actions or Geſtures expreſſive of Contempt or Reproach, without an Aſſault upon the Perſon.

THIS Rule will, I conceive, govern every Caſe where the Party killing upon ſuch Provocation maketh Uſe of a deadly Weapon, or otherwiſe manifeſteth an Intention to kill,

kill, or to do some great bodily Harm. But if he had given the other a Box on the Ear, or had struck him with a Stick or other Weapon *not likely to kill, and bad unluckily and against his Intention* killed, it had been but Man-
 slaughter. C H A P. V. Keil. 130, 131.

THE Difference between the Cases is plainly this. In the former the *Malitia*, the wicked vindictive Disposition already mentioned, evidently appeareth: in the latter it is as evidently wanting. The Party in the first Transport of his Passion intended to chastise for a Piece of Insolence which few Spirits can bear. In this Case the Benignity of the Law interposeth in Favour of human Frailty; in the other it's Justice regardeth and punisheth the apparent Malignity of the Heart.

SECT. 2. AND it ought to be remembered, that in all other Cases of Homicide upon slight Provocation, if it may be reasonably collected from the Weapon made use of, or from any other Circumstance, that the Party intended to kill, or to do some great bodily Harm, such Homicide will be Murder. The Mischief done is irreparable, and the Outrage is considered as flowing rather from brutal Rage or diabolical Malignity than from human Frailty. And it is to human Frailty, and to that alone, the Law indulgeth in every Case of felonious Homicide. SECT. 2.

A few Instances may serve for Illustration.

A. finding a Trespasser upon his Land in the first Transport of his Passion beateth him, and unluckily happeneth to kill; this hath been held to be Manslaughter. But it must be understood, that he beat him, not with a mischievous Intention, but meerly to chastise for the Trespass, and to deter him from committing the like. For if he had knocked his Brains out with a Bill or Hedgestake, or had given him an outrageous Beating with an ordinary Cudgel beyond the Bounds of a sudden Resentment, whereof he had died, it had been Murder. For these Circumstances are some of the genuine Symptoms of the *Mala Mens*, the Heart bent upon Mischief, which, as I have already shewn, enter into the true Notion of Malice in the legal Sense of the Word. 1. Hale 473. Keil. 132.

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V.
Cro. Car.
131.
Palm. 545.
Jones (W.)
198.
Old Bayly
Apr. 1704.
MSS. Tracy
and Denton.

A PARKER found a Boy stealing Wood in his Master's Ground, he bound him to his Horse's Tail and beat him. The Horse took a Fright and ran away, and dragged the Boy on the Ground so that he died. This was held to be Murder.* For it was a deliberate Act and favoured of Cruelty.

THERE being an Affray in the Street, one *Stedman* a Foot-Soldier ran hastily towards the Combatants. A Woman seeing him run in that Manner cried out, "You will not murder the Man will you?" *Stedman* replied, "What is that to you, you Bitch?" the Woman thereupon gave him a Box on the Ear, and *Stedman* struck her on the Breast with the Pommel of his Sword. The Woman then fled, and *Stedman* pursuing her stabbed her in the Back. *Holt* was at first of Opinion that this was Murder, *a single Box on the Ear from a Woman not being a sufficient Provocation to kill in this Manner, after he had given her a Blow in return for the Box on the Ear.* And it was proposed to have the Matter found special. But it afterwards appearing in the Progress of the Trial, that the Woman struck the Soldier in the Face with an Iron Paten, and drew a great deal of Blood, it was held clearly to be no more than Manlaughter.

THE Smart of the Man's Wound, and the Effusion of Blood might possibly keep his Indignation boiling to the Moment of the Fact.

Stra. 499.

R. v. Tranter
and Reason.

MR. *Lutterel* being arrested for a small Debt prevailed on one of the Officers to go with him to his Lodgings, while the other was sent to fetch the Attorney's Bill, in order, as *Lutterel* pretended, to have the Debt and Costs paid. Words arose at the Lodgings about *Civility Money*, which *Lutterel* refused to give; and went up Stairs pretending to fetch Money for the Payment of the Debt and Costs, leaving the Officer below. He soon returned with a Brace of loaded Pistols in his Bosom, which at the Importunity of his Servant he laid down on the Table saying, *He did not intend to hurt the Officers, but he would not be ill-used.* The

* The Cases of immoderate Correction, mentioned already under the Head of accidental Death, carry this Rule much further than these do. For Correction with Moderation is certainly lawful. But in these Cases the least Blow would have been unjustifiable.

The Officer who had been sent for the Attorney's Bill soon returned to his Companion at the Lodgings; and Words of Anger arising *Lutterel* struck one of the Officers on the Face with a walking Cane, and drew a little Blood, Whereupon both of them fell upon him, one stabbed him *in nine Places, he all the while on the Ground begging for Mercy and unable to resist them.* And one of them fired one of the Pistols at him *while on the Ground*, and gave him his Death's Wound. This is reported to have been held *Manlaughter by Reason of the first Assault with the Cane.*

THIS is the Case as reported by Sir *John Strange*; and an extraordinary Case it is, that all these Circumstances of Aggravation, two to one, he helpless and on the Ground begging for Mercy, stabbed in nine Places and then dispatched with a Pistol; that all these Circumstances, plain Indications of a deadly Revenge or diabolical Fury, should not outweigh a slight Stroke with a Cane.

See Holt's
Opinion in
the last Case.

BUT in the printed Trial there are some Circumstances stated, which are entirely dropped, and others very slightly mentioned by the Reporter.

6. St. Tri.
195.

1. MR. *Lutterel* had a Sword by his Side, which, after the Affray was over, was found drawn and broken. How that happened did not appear in Evidence; for Part of the Affray was at a Time when no Witness was present, nobody spoke to the Whole.

2. WHEN *Lutterel* laid the Pistols on the Table, he declared that he brought them down, *because he would not be forced out of his Lodgings.*

3. HE threatened the Officers several Times.

4. ONE of the Officers appeared to have been wounded in the Hand with a Pistol-Shot, (for both the Pistols were discharged in the Affray) and slightly on the Wrist with some sharp-pointed Weapon: and the other was slightly wounded in the Hand with a like Weapon.

5. THE Evidence touching *Lutterel's* begging for Mercy was not that he was on the Ground *begging for Mercy*; but that on the Ground he held up his Hands AS IF he was *begging for Mercy.*

THE Chief-Justice directed the Jury, that if they believed Mr. *Lutterel* endeavoured to rescue himself, which

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he seems to think was the Case, and very probably was the Case, it would be justifiable Homicide in the Officers. However, as Mr. *Lutterel* gave the first Blow *accompanied with Menaces to the Officers, and the Circumstances of producing loaded Pistols to prevent their taking him from his Lodgings*, which it would have been their Duty to have done, if the Debt had not been paid or Bail given, he declared IT COULD BE NO MORE *than Manslaughter*.

THIS Direction of the Chief-Justice the Reporter hath totally omitted. And therefore I have taken the Liberty to state the Case more largely than otherwise I should have done. And I cannot help saying, that the Circumstances omitted in the Report are too material, and enter too far into the true Merits of the Case to have been dropped by a Gentleman of Sir *John Strange's* Abilities and known Candour, if he had not been over studious of Brevity.

IMPERFECT Reports of Facts and Circumstances, especially in Cases where every Circumstance weigheth *something* in the Scale of Justice, are the Bane of all Science, that dependeth upon the Precedents and Examples of former Times.

12. Rep. 87.
1. Hale 453.

I HAVE always thought *Rowly's* Case a very extraordinary one, as it is reported by *Coke*, from whom *Hale* cites it. The Son fights with another Boy and is beaten; he runs home to his Father all bloody; the Father takes a Staff, runs three Quarters of a Mile, and beats the other Boy, who dieth of this Beating. This is said to have been ruled Manslaughter, *because done in sudden Heat and Passion*.

SURELY the Provocation was not very grievous. The Boy had fought with one who happened to be an Overmatch for him, and was worsted; a Disaster slight enough, and very frequent among Boys.

IF upon this Provocation the Father, after running three Quarters of a Mile, had set his Strength against the Child, had dispatched him with an Hedgestake or any other deadly Weapon, or by repeated Blows with his Cudgel, it must, in my Opinion, have been Murder; since any of these Circumstances would have been a plain Indication of the *Malitia*, the mischievous vindictive Motive before explained. But with regard to these Circumstances, with what Wea-

pon

pon or to what Degree the Child was beaten, *Coke* is totally silent. C H A P. V.

BUT *Croke* setteth the Case in a much clearer Light, *Cro. Jac.* and at the same Time leadeth his Readers into the true 296. Grounds of the Judgment. His Words are, "*Rowly* struck the Child with a small Cudgel,* of which Stroke he afterwards died."

I THINK it may be fairly collected from *Croke's* manner of speaking, that the Accident happened by a single Stroke with a Cudgel not likely to destroy and that Death did not immediately ensue. The Stroke was given in Heat of Blood, and not with any of the Circumstances which import the *Malitia*, the Malignity of Heart attending the Fact already explained, and therefore Manslaughter. I observe that Lord *Raymond* layeth great Strefs on this Circumstance, Lord Raym. that the Stroke was with a Cudgel not likely to kill. 1498.

SECT. 3. THE Rule laid down in the first Section will not hold in Cases where from Words or Actions of Reproach or Contempt, or indeed upon any other sudden Provocation, the Parties come to Blows, no undue Advantage being sought or taken on either Side. SECT. 3.

A. useth provoking Language or Behaviour towards *B.* 1. Hale 456. *B.* striketh him, upon which a Combat ensueth, in which *A.* is killed. This is held to be Manslaughter, for it was a sudden Affray and they fought upon equal Terms. And in such Combats upon sudden Quarrels it mattereth not who gave the first Blow

BUT if *B.* had drawn his Sword and made a Pass at *A.* his Sword then undrawn; and thereupon *A.* had drawn and a Combat had ensued, in which *A.* had been killed, this Keil. 61. would have been Murder. For *B.* by making his Pass, his Lord Raym. Adversary's Sword undrawn, shewed that he sought his 1489. Blood; and *A.'s* Endeavour to defend himself, which he had a Right to do, will not excuse *B.* But if *B.* had first Keil. 130. drawn and forborn 'till his Adversary had drawn too, it Lord Raym. had been no more than Manslaughter. 1493.

MAWGRIIDGE whose Case hath been already mentioned upon another Occasion, upon Words of Anger threw a

* *Godbolt* 182, calleth it a *Rod*, meaning I suppose a small Wand.

C H A P. V. Bottle *with great Force* at the Head of Mr. *Cope*, and immediately drew his Sword; Mr. *Cope* returned a Bottle at the Head of *Mawgridge*, and wounded him. Whereupon *Mawgridge* stabbed *Cope*. This was ruled to be Murder. For *Mawgridge* in throwing the Bottle shewed an Intention to do some great Mischief; and his drawing immediately shewed that he intended to follow his Blow. And it was lawful for Mr. *Cope* being so assaulted to return the Bottle.* The Judgment in this Case was held to be good Law by all the Judges of *England* at a Conference in the Case of Major *Oneby*.

Lord Raym.
1489.

To what I have offered with regard to sudden Rencounters let me add, that the Blood, already too much heated, kindleth afresh at every Pass or Blow. And in the Tumult of the Passions, in which *meer instinct Self-Preservation*, hath no inconsiderable Share, the Voice of Reason is not heard. And therefore the Law in Condescension to the Infirmities of Flesh and Blood hath extenuated the Offence.

SECT. 4.

SECT. 4. BUT in these, and indeed in every other Case of Homicide upon Provocation how great soever it be, if there is sufficient Time for Passion to subside, and for Reason to interpose, such Homicide will be Murder.

A. FINDETH a Man in the Act of Adultery with his Wife, and in the first Transport of Passion killeth him; this is no more than Manslaughter. But had he killed the Adulterer deliberately and upon Revenge *after the Fact and sufficient cooling Time*, it had been undoubtedly Murder. For let it be observed, that in all possible Cases deliberate Homicide upon a Principle of Revenge is Murder. No Man under the Protection of the Law is to be the Avenger of his own Wrongs. If they are of such a Nature for which the Laws of Society will give him an adequate Remedy, thither he ought to resort. But be they of what Nature soever, he ought to bear his Lot with Patience and remember, *that Vengeance belongeth only to the most High*.

SECT.

* See Lord *Holt's* Report of *Mawgridge's* Case *Keil*. 119. The learned Judge in this Case, after a short introductory Discourse wherein I cannot totally agree with him, entereth with great Learning and sound Reason into the Point upon which the Case turned. He doth so likewise in the Case of the King and *Plummer*.

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S E C T. 5.

SECT. 5. UPON this Principle, deliberate Duelling if Death ensueth, is in the Eye of the Law Murder. For Duels are generally founded in deep Revenge. And though a Person should be drawn into a Duel, not upon a Motive so criminal, but meerly upon the Punctilio of what the *Swordsmen falsely call Honour*, that will not excuse. For he that deliberately seeketh the Blood of another upon a private Quarrel acteth in Defiance of all Laws human and divine, whatever his Motive may be.

BUT if, as I said before, upon a sudden Quarrel the Parties fight upon the Spot, or if they presently fetch their Weapons and go into the Field and fight, and one of them falleth, it will be but Manslaughter; because it may be presumed the Blood never cooled.

It will be otherwise if they appoint to fight the next Day, or even upon the same Day at such an Interval as that the Passion might have subsided: or if from any Circumstances attending the Case it may be reasonably concluded, that their Judgment had actually controuled the first Transports of Passion before they engaged. The same Rule will hold if after a Quarrel they fall into other Discourse or Diversions, and continue so engaged a reasonable Time for cooling.

Keil. 27.

Oneby's
Case.

Stra. 773.
Lord Raym.
1489.

C H A P. VI.

Of the Statute of Stabbing.

THAT particular Species of Manslaughter which is ousted of Clergy by the Act of 1. Jac. 1. commonly called *The Statute of Stabbing* cometh now in Course to be considered.

1. Jac. 1. c. 8.

THIS Statute was made at a critical Time, and as Tradition hath it, upon a very special Occasion. It is supposed to have been principally intended to put an effectual Stop to Outrages then frequently committed by Persons of inflammable Spirits and deep Resentment; who wearing short Daggers under their Cloaths were too well prepared to

Farresly 133.

Lord Raym.

845.

C H A P. VI. to do quick and effectual Execution upon Provocations extremely flight.

SECT. I.
Keil. 55.

IT was agreed by the Judges in Lord *Morley's* Case that this Statute is declaratory of the Common-Law, and was made for preventing the Inconveniences arising from the Forwardness or Compassion of Juries; who were apt to consider that to be a Provocation for extenuating Murder, which in Law was not. Whether it was merely a declaratory Statute or no, I will not take upon me to determine. But certain it is, that though the Words descriptive of the Offence are very general, probably in *Terrorem*, yet in the Construction of the Statute the Circumstances which at Common-Law will serve to justify, excuse, or alleviate in a Charge of Murder, have always had their due Weight in Prosecutions grounded on the Statute.

THE Words are, "If any Person shall *stab* or *thrust* any Person, such Person not having then a Weapon *drawn*, nor having *first* struck the Party killing, and the Party die in six Months; except in Cases of Self-Defence, Mischance, or for preserving the Peace or Chastizing his Child or Servant, such Offender shall &c."

BUT general as the Words are, yet Cases coming within the Letter of the Act, and not covered by any of the Exceptions, have very rightly been adjudged not to be within the Meaning of it; the Justice or Benignity of the Law over-ruling the rigorous Penning of the Statute.

I WILL by way of illustration mention a few Cases, some of which have been already cited to other Purposes.

THE Case of an Adulterer stabbed by the Husband in the Act of Adultery lately cited is not within the Act, it is Manlaughter at Common-Law. For the Provocation is greater than Flesh and Blood in the first Transport of Passion can bear.

Sti. 469.

A MAN is assaulted by Thieves in his House, the Thieves having no Weapon drawn nor having struck him; he stabbeth one of them, this is not within the Act, it is justifiable Homicide.

1. Hale 470.

AN Officer pushed abruptly and violently into a Gentleman's Chamber early in the Morning in order to arrest him, *not telling his Business nor using Words of Arrest:* the

the Gentleman *not knowing that he was an Officer*, under the first Surprize took down a Sword that hung in the Chamber and stabbed him. It was ruled Manslaughter at Common-Law, though the Defendant was indicted on the Statute, and the Officer had no Weapon drawn, nor had he struck the Defendant: who not knowing the Officer's Business might from his Behaviour reasonably conclude that he came to rob or murder him.

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UPON an Outcry of Thieves in the Night-Time a Person who was concealed in a Closet, but no Thief, was, in the Hurry and Surprize the Family was under, stabbed in the Dark. This was held to be an innocent Mistake, and ruled Chance-medley.

1. Hale 42.
474.
Cro. Car.
539.
Jones (W.)
429.

POSSIBLY it might have been better ruled Manslaughter at Common-Law; due Circumspection not having been used, but it was not Manslaughter within the Statute.

CASES of this Kind are very numerous. Many of them have been already stated to other Purposes under the Head of justifiable or excusable Homicide. And more there are which cannot have escaped the Observation of any attentive Reader. In all such Cases the Justice or Benignity of the Common-Law hath over-ruled the Rigour of the Statute.

SECT. 2. A Prisoner whose Case may be brought within the Letter of the Act commonly is arraigned upon two Indictments, one at Common-Law for Murder, the other upon the Statute. And if it cometh out in Evidence that the Fact was either justifiable or amounted barely to Manslaughter at Common-Law, it hath been rarely known that such Person hath been convicted of Manslaughter upon the Statute.

SECT. 2.

HARD indeed it would be should he be so convicted. For if the Tradition I hinted at above is to be depended on, this is one of those Acts which, to borrow an Expression from Lord Bacon, was made *upon the Spur of the Times*. Whereas the Rules of the Common-Law in Cases of this Kind may be considered as the Result of the Wisdom and Experience of many Ages.

LET me add, that if the Outrages at which the Statute was levelled had been prosecuted with due Vigour and proper

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per Severity upon the Foot of Common-Law, I doubt not an End would soon have been put to them, without incumbering our Books with a special Act for that Purpose, and a Variety of Questions touching the true Extent of it. This Observation will hold with regard to many of our penal Statutes made upon special and pressing Occasions, and favouring rankly of the Times.

AFTER what I have said it may not be thought extremely necessary to enter minutely into the Circumstances which will bring particular Cases within the Statute, or take them out of it. But something very briefly shall be said.

SECT. 3.

1. Hale 470.

SECT. 3. THE Statute in describing the Offence saith, "If any Person shall *stab* or *thrust*." Under these Words shooting with any Sort of Fire-Arms, or thrusting with a Staff or any other blunt Weapon, have been brought within the Act. The Case of thrusting with a blunt Weapon must be supposed to have been in the Contemplation of the Legislature. Otherwise it will not be easy to account for the Exception with regard to the Correction of Children or Servants.

1. Hale 469.

THE Case of shooting with Fire-Arms will govern the Cases of sending an Arrow out of a Bow or a Stone from a Sling, or using any Device of that Kind *held in the Hand of the Party at the Instant of discharging it*. But throwing at a Distance and wounding the Party, whereby Death ensueth, the Weapon, be it what it may, *being delivered out of the Hand* * at the Time the Stroke was given, hath not been thought with strict Propriety to come under the Notion of stabbing or thrusting.

SECT. 4.

1. Hale 470.
Godb. 154.

SECT. 4. THE Statute hath likewise these Words further descriptive of the Offence, "Such Person" [the Person stabbed or thrust] "not having then a Weapon *drawn*, nor having *first* struck the Person killing."

AN ordinary Cudgel, or other Thing proper for Defence or Annoyance in the Hand of the Party hath been consider-

* *Holt* in *Keil*. 131. and by the Court in *Newman's Case* at *Old Bayly* in *Oct.* 8. *An.* where the Point of a Sword was thrown at 20 Yards Distance. *MSS. Denton and Chapple.*

ed as a Weapon drawn, so as to take the Case out of the Statute; though the Words a *Weapon drawn* seem rather to import a Sword, or other Weapon of that Kind *drawn out of the Scabbard*. It would sound extremely harsh to say, that a Sword in the Scabbard is a Weapon drawn within the Meaning of the Act. And yet I presume there are some Swords yet remaining, which probably have not been *drawn* since the Restoration, as well fitted for Defence or Annoyance as an ordinary Cudgel. But the Judges have wisely held a strict Hand over this Statute. They did so very remarkably in the Cases where it hath been held that Persons present aiding and abetting, though at Common-Law Principals in the Manslaughter, are not within the Statute, so as to be ousted of Clergy. Allen 43. 1. Hale 468. Salk. 542.

SECT. 5. THE Judges were once divided upon the Construction of the Word *Then*, “the Party killed having *then* no Weapon drawn.” The Point in Debate was, Whether the Word *Then* was to be confined to the Instant the *Stab* was given, or whether it related to the whole Time of the Combat. But as I do not find that this Point received any judicial Determination, I leave it to the Men of more Leisure and Refinement. SECT. 5. 3. Lev. 255.

IN another Case, a Question arose upon the Construction of the Word *First* in the Statute. “The Person killed *not having first* struck the Person killing.” Eleven of the Judges held that the Words, “Not having *first* struck,” meant, not having given the *first Blow in the Affray*. *Richardson* singly was of Opinion that the Meaning of the Words was, not having struck *before the mortal Wound was given*. The major Vote however prevailed. But in the Opinion of *Holt*, against the natural Order of the Words and the obvious Meaning of the Act. The Arrangement of the Words, as they stand in the Statute, seemeth to have been inverted, and a Construction the Legislature never dreamt of extorted from them. Jones (W.) 340. Skin. 668.

THESE are some of the Questions upon which the Ingenuity of learned Men hath been employed in the Construction of this Statute. But wherever the Defendant is indicted at Common-Law and also upon the Statute, the Question most worthy of Litigation would in my Opinion be,

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be, Is the Fact upon Evidence Murder at Common-Law, or is it not? especially if the Statute was declaratory of the Common-Law, as in the Passage already cited from *Keiling* it was resolved to be.

ONE general Rule however may, as I conceive, be safely laid down, that in all Cases of Doubt and Difficulty upon the Construction of the Statute the Benignity of the Common-Law ought to turn the Scale.

C H A P. VII.

BEFORE I quit the Subject of Manslaughter, I will submit to Consideration a few Things that have occurred to me touching the Distinction between that Offence and Murder in the Light our oldest Writers considered those Offences. And how far later Statutes have introduced the material Distinction between those Offences which at present is established.

THE Distinction between Murder and Manslaughter, as it is stated by our oldest Writers, seemeth to have been in their Time merely nominal. By the one they meant an insidious secret Assassination, *Occulta Occiso, nullo Sciente aut Vidente*, as they express themselves. And Homicide under these Circumstances, if the Offender was not apprehended, subjected the Township, as I have already observed, to the Amerciament to which they gave the Name of *Murdrum*.

EVERY other Species of felonious Homicide they called simply *Homicidium nequitèr & in Feloniâ factum*. But both Offences with regard to the Consequences of a Conviction were the same; both capital, unless the Privilege of Clergy interposed; and when it did, both were treated alike.

THE legal Notion of Murder in Contradistinction to Manslaughter was afterwards enlarged, and took in every Species of Homicide, whether openly or privily committed, if attended with Circumstances indicating a preconceived *Malice* in the large Sense of that Term which I have already stated and explained: or to borrow a Term from the *Scotch* Law, "Slaughter of forethought Felony."

STAN-

Vid. Bract.
cap. de Mur-
dro.

Vid. Bract.
cap. de Ho-
micidio.

STANFORD, the clearest and best Writer on the Crown-Law before *Hale*, stateth the old Rule from *Braeton*; but addeth, that the enlarged Idea taking in every Species of Homicide with Malice prepensed had long obtained.

C H A P.
VII.
Stanf. c. 10.
Id. p. 18. B.

How long it had obtained is difficult to determine with Precision; and I think it a Point not worthy of much Investigation. It had certainly obtained long before *Stanford's* Time. For though, as I observed at the Entrance into this Discourse, the antient Precedents and Writers on our Law do not make use of the Term Homicide *upon Malice forethought* in Contradistinction to simple felonious Homicide unattended with that Circumstance; yet it is certain that the Term, and also the Distinction between the one Offence and the other founded in the Circumstance of Malice was well-known and understood at or very near the Time those Writers flourished.*

THE ACTS † of general Pardon from the 50. *Edw.* 3. to this Time constantly and uniformly except Murder of *Malice prepensed*, or in Words tantamount, corresponding exactly with our present Notion of that Offence.

UNDER these ACTS, Manslaughter not being excepted was always understood to be pardoned.

HERE was a real Distinction, though temporary and occasional, established between the Offences of Murder and simple felonious Homicide: which was certainly founded on the supposed Malignity or Non-malignity of the Heart at the Time the Fact was committed. In one Case the Mercy of the Crown interposed, in the other the Offender was left open to the Justice of the Law.

THE Statute of *Rich.* 2. likewise presupposeth the legal Distinction as well-known in those Days; and, as far as it goeth, establisheth a real and lasting Difference between the Offences. It enacteth, "That no Pardon shall be allowed for the Death of a Man slain by *Await, Assault, or Malice prepensed*.—unless the same Murder &c. be specified in the Charter. And if in any Pardon it be not so

13. Rich. 2.

* See the Patent Rolls already cited, many Pardons for Homicide under various Circumstances reciting that the Facts were committed *Non per Feloniam aut excogitatam Malitiam*.

† See the ACTS in *Rassal* or any Edition before 1618, when *Pulton's* Collection omitting temporary ACTS and ACTS supposed to be repealed or obsolete, was published.

" expressed,

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“ expressed, the Justices shall enquire by Inquest if he be
“ murdered or slain by Assault, Await, or Malice prepen-
“ fed. And if they find that he was so slain, the Char-
“ ter shall be disallowed.”

UPON such finding of the Jury the King was presumed to have been deceived in his Grant. And therefore the Statute provideth that no general Words in the Pardon, how comprehensive soever, shall avail the Offender. The Crown was not presumed intentionally to pardon premeditated Murder, unless it's Intention was plainly and clearly expressed in the Charter.

THE Statutes ousting Clergy in the Case of wilful Murder likewise presuppose an established well-known Distinction between that Offence and simple felonious Homicide; and fall in exactly with our present Notion of Homicide attended with and aggravated by the Circumstance of *Malice prepensed*.

12. *H. 7.* If any lay Person *prepenfedly* murder his Lord, &c.

23. *H. 8.* Ousteth Clergy in Case of wilful Murder of Malice prepensed; but excepteth Persons in holy Orders, viz. of the Order of Subdeacon or above.

25. *H. 8.* Referreth to the 23^d, and is *with regard to the present Question* meerly auxiliary to it.

1. *Edw. 6.* Which for Reasons given in another Place, I think, hath superseded both the Acts of *H. 8.* as far as concerneth the Enumeration of Offences ousted of Clergy, describeth the Offence by the Term Murder of Malice prepensed; but doth not extend to Accessaries before the Fact, nor to Persons standing mute, &c. as the two Acts of *H. 8.* taken together did.

4. 5. *Ph. and M.* Is auxiliary to the Act of *Edw. 6.* and extendeth to Accessaries before the Fact, and to Persons standing mute &c. and the Offence is here described singly by the Words *wilful Murder*; which in the Language of the Law *ex Vi Termin* import every Thing we now understand by Murder of Malice prepensed in Contradistinction to Manslaughter.

AND therefore in an Indictment for Murder the Word *Murdravit* is so necessary and essential in the Description of the Offence, that no Words however importing the same Offence,

Bro. Indict-
ment pl. 7.

Offence, as *ex Malitiâ præcogitatâ Interfecit*, will now bring the Case within the Statutes. And for want of that technical operative Word the Defendant cannot be convicted of Murder, though he may of Manslaughter.

THESE Statutes ousting Clergy in the Case of Murder, have introduced a material and lasting Distinction between that Offence, and what we now commonly call *Manslaughter*, with regard to the Consequences of a Conviction. But the Statutes of *H. 8.* were extremely partial and defective, all Persons in holy Orders, who ought themselves to have known and taught others their Duty, being excepted. And the Statute of *H. 7.* already cited was in like Manner defective. This Defect the Statutes of *Edw. 6.* and *Pb. and M.* have supplied.

BUT still, all Persons not capable of holy Orders, as Women, who from the Delicacy of their Frame seem to be the most susceptible of human Passions, and some others, were left to the extreme Rigour of the Common-Law, and to the Mercy of the Crown. For at Common-Law all Felonies, except Petit Larceny, Rape and Mayhem, were considered as capital Offences, unless in Cases where the Offender was capable of holy Orders and qualified for them. And in those Cases, I am sorry to say it, Murders, though of the most atrocious Kind, were not excluded. And therefore wherever I speak of the Benignity of the Law and it's Condescension to human Infirmary in the Case of Manslaughter, I would be always understood to speak of the Law in it's present State.

BUT Light and sound Sense have at length, though by very slow Degrees, made their Way to us. We now consider the Benefit of Clergy, or rather the Benefit of the Statutes, as a *Relaxation of the Rigour of the Law*, a Condescension to the Infirmities of the human Frame. And therefore in the Case of all clergyable Felonies, we now measure the Degree of Punishment by the real Enormity of the Offence; not as the Ignorance and Superstition of former Times suggested, by a senseless Dream of sacred Persons or sacred Functions.

THE 21. *Jac. 1.* went a little, and but a little Way in Favour of the better Half of the human Race. Women
U. for

C H A P. VII. for grand Larceny to the Value of 10 s. were put upon the same Foot as Men intitled to Clergy.

3. 4. W. and
M. c. 9.

It is really astonishing that when their Case came so professedly under the Consideration of the Legislature more was not then done in their Behalf. But here for more than half a Century the Wisdom of the Nation stopped short. 'Till the 3^d and 4th of *W.* and *M.* put Women in all Cases of clergyable Felonies upon the same Foot as Men intitled to Clergy.

5. An. c. 9.

THE 5th of Queen *Anne* at length abolished the idle Ceremony of reading, and so broke down, if I may use the Expression, the Wall of Partition between Subject and Subject under one and the same Degree of Guilt. This Measure intitled those who before were supposed to be under a legal Incapacity for Orders, as *Jews* and some others were, and likewise those who in Presumption of Law were not qualified in Point of Learning, of which reading a Scrap * of Latin, which they called *the Neck Verse*, was commonly made the Test, this Measure intitled all these to the Indulgence of the Law in common with the rest of their fellow Subjects.

FROM this Period the Measure of Punishment hath, as I before hinted, been governed by the Degrees of real Guilt; not by an absurd Distinction between Subject and Subject, originally owing to downright Impudence on one Hand, and to meer Fanaticism or amazing Pusillanimity on the other.

THUS hath the Order of Things, which the Pride and Presumption of the *Romish* Clergy introduced, and the Ignorance or Enthusiasm of the Laity adopted, been happily inverted. Our Ancestors in Questions touching the Allowance or Non-allowance of Clergy regarded solely the Function or Abilities of the Offender, we the real Demerit of the Offence.

* *Miserere mei Deus.*

C H A P. VIII.

Of Murder.

I HAVE already observed, that our oldest Writers made use of the Term *Murder* in a very narrow limited Sense ; and that in succeeding Ages the Definition of this Offence, in Contradistinction to simple felonious Homicide, was enlarged so as to take in all the Cases which appeared to have been attended with Circumstances indicating a premeditated Malice in the Party killing. And that this enlarged Idea hath long obtained, and exactly falleth in with our present Notion of Murder of Malice prepense.

I HAVE likewise endeavoured to state and illustrate by Authorities already cited the true legal Notion of the Term *Malice* as applied to the Case of Murder, which I will not now repeat. It is sufficient to refer the Reader to what is offered by way of Preliminary to the Discourse upon the Subject of Homicide in general.

I CHOSE to enlarge upon that Point there rather than in this Place ; because I thought many Things I have said in treating of the lower Species of Homicide, whether justifiable, excusable, or alleviable, would be better understood by first fixing in the Reader's Mind the true Idea of that Degree of Malignity implied in the Term *Malice* ; which, in Cases *primâ Facie* falling within the lower Species, hath made the Fact, all Circumstances considered, amount to the Crime of Murder. I have likewise as I went along endeavoured to state the Circumstances from which the Law inferreth the Malignity of the Heart.

THESE Matters have I confess in a manner exhausted the Subject I am now professedly entering upon. But as the Law concerning Murder is interwoven with the lower Species of Homicide, and ariseth from a Variety of Circumstances connected with *them*, this Anticipation became in some measure necessary. Since in treating of the Cases which *primâ Facie* seem to fall under the lower Species, I could not make myself better understood than by considering them under every Light they will bear. I will there-

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fore confine myself to the Circumstances importing pre-
penssed Malice which have not already fallen in my way.
Though I fear the Nature of my Subject, complicated as
it is, will betray me into some little Repetition, which I
will avoid as much as possible.

THE grosser Instances of wilful Murder, and where
the Malignity of the Heart, the *Malitia* I have already
explained, need not to be mentioned in a Dis-
course of this Kind. The Cases upon which Doubts
have arisen, or which may be the Subject of future Liti-
gation, are only proper to be mentioned; and to such I
shall confine myself.

SECT. I.

SECT. I. SOMETHING hath been said briefly under
the Head of Homicide in Advancement of Justice, touch-
ing the Killing of Officers in the Execution of their Of-
fices, and of other Persons having Authority to arrest or
imprison, or acting under Colour of such Authority. But
this being a Matter in which the Justice of the Kingdom
is deeply concerned, I will now submit to Consideration
my Thoughts upon that Subject more at large.

MINISTERS of Justice while in the Execution of their
Offices are under the peculiar Protection of the Law.
This special Protection is founded in great Wisdom and
Equity, and in every Principle of political Justice. For
without it the publick Tranquillity cannot possibly be
maintained, or private Property secured; nor in the ordi-
nary Course of Things will Offenders of any Kind be a-
mesurable to Justice. And for these Reasons the Killing of
Officers so employed hath been deemed Murder of Ma-
lice prepense, as being an Outrage wilfully committed in
Defiance of the Justice of the Kingdom; the strongest
Indication possible of the *Malitia*, the Malignity of
Heart which I have already stated and explained.

SECT. 2.

SECT. 2. THIS Rule is not confined to the Instant
the Officer is upon the Spot, and at the Scene of Action,
engaged in the Business which brought him thither; for
he is under the same Protection of the Law *Eundo, Mo-
rando, & Redeundo*. And therefore if he cometh to do his
Office, and meeting with great Opposition retireth, and in
the

the Retreat he is killed, this will amount to Murder. He went in Obedience to the Law and in the Execution of his Office, and his Retreat was necessary in order to avoid the Danger that threatened him. And upon the same Principle if he meeteth with Opposition by the Way, and is killed before he cometh to the Place, *such Opposition being intended to prevent his doing his Duty, which is a Fact to be collected from Circumstances appearing in Evidence*, this likewise will amount to Murder. He was strictly in the Execution of his Office, going to discharge the Duty the Law required of him.

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1. Hale 463.

SECT. 3. NOR is the Protection the Law affordeth him confined to his own Person. Every Man who cometh in Aid of him (I speak here principally of such Officers as at Common-Law or by the Appointment of the Crown are properly Conservators of the Peace), every Man lending his Assistance for the keeping of the Peace, or attending for that Purpose, whether commanded or not, is under the same Protection as the Officer himself.

SECT. 3.

SECT. 4. THE Protection the Law affordeth in these Cases must not be considered as confined to the ordinary Ministers of Justice or their Assistants. It reacheth, under some Limitations which shall be considered, to the Cases of private Persons interposing for preventing Mischief in Case of an Affray, or using their Endeavour for apprehending Felons, or those who have given a dangerous Wound, and for bringing them to Justice. For these People are likewise in the Discharge of a Duty the Law requireth of them. The Law is their Warrant, and they may not improperly be considered as Persons engaged in the publick Service and for the Advancement of Justice, though not specially appointed to it. And upon that Account they are under the same Protection as the ordinary Ministers of Justice are.

SECT. 4.

SECT. 5. THIS Rule is not confined to those who are present so as to have ocular Proof of the Fact, or to those who first come to the Knowledge of it. For if in these Cases fresh Suit is made, and *a fortiori* if Hue and Cry be

SECT. 5.

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levied, all who join in Aid of those who began the Pursuit are under the same Protection of the Law as the others are, and stand in every Respect upon the same Foot. Otherwise no Man of common Prudence would join in the Pursuit; and many great Offenders would escape the Hands of Justice.

1. Hale 464.

A Robbery is committed on the Highway or elsewhere, the Country upon Notice riseth and pursueth the Robbers, who turn and make Resistance, and in the Struggle one of the Robbers is killed, this on the Part of the Pursuers is justifiable Homicide. But on the other Hand, if one of the Pursuers is killed by the Robbers or any of them, it will be Murder in the whole Gang *joining in such Resistance*, whether present at the Murder or at a Distance, *but taking a Part in such Resistance*. The Law is the same in Cases of Hue and Cry duly levied.

SECT. 6.

SECT. 6. NOR is this special Protection of the Law confined to Cases of a meer criminal Nature, where the publick Peace is broken or endangered. The Ministers of Justice in civil Suits, under proper Limitations which shall be considered, are intitled to the same Protection for themselves and Followers, and upon the same Principles of political Justice.

BUT these Rules require some further Explanation.

SECT. 7.

Keil. 66,
115.

1. Hale 460,
461.

SECT. 7. WITH regard to such Ministers of Justice who in Right of their Offices are Conservators of the Peace, and in that Right alone interpose in the Case of Riots or Affrays, it is necessary in order to make the Offence of killing them amount to Murder, that the Parties concerned should have some Notice with what Intent they interpose: otherwise the Persons engaged may in the Heat and Bustle of an Affray imagine they came to take a Part in it. But in these Cases a small Matter will amount to a due Notification. It is sufficient if the Peace is commanded, or the Officer in any other Manner declare with what Intent he interposeth. Or if the Officer be within his proper District, and known or but generally acknowledged to bear the Office he assumeth, the Law will presume the Party killing had due Notice of his Intent, especially if it be in the

the Day-Time. In the Night some further Notification is necessary, and commanding the Peace, or using Words of the like Import notifying his Business will be sufficient.

I remember a Saying of a very learned Judge, *That a Constable's Staff will not make a Constable.* This is very true. But if a Minister of Justice be present at a Riot or Affray within his District, and in order to keep the Peace produceth his Staff of Office or any other known Ensign of Authority, this, I conceive, will be a sufficient Notification with what Intent he interposeth. And if after this Notification Resistance is made, and he or any of his Assistants killed, it will be Murder in every Man who joined in such Resistance.

AND in the Case of Arrests upon Process, whether by Writ or Warrant, if the Officer named in the Process give Notice of his Authority, and Resistance is made and the Officer killed, it will be Murder; if in Fact such Notification was true *and the Process legal.* For after such Notification the Parties opposing the Arrest acted at their own Peril.

PRIVATE Persons interposing in Case of sudden Affrays for parting the Combatants and preventing Bloodshed, must undoubtedly give express Notice of their friendly Intent, for the Reason given above.

SECT. 8. I have said above by way of Caution, *if the Process be legal.* But I would not be understood to mean any Thing more than, *provided the Process, be it by Writ or Warrant, be not defective in the Frame of it, and issue in the ordinary Course of Justice from a Court or Magistrate having Jurisdiction in the Case.* There may have been Error or Irregularity in the Proceeding previous to the Issuing of the Process; but if the Sheriff or other Minister of Justice be killed in the Execution of it, this will be Murder. For the Officer to whom it is directed must at his Peril pay Obedience to it. And therefore if a *Capias ad Satisfaciendum, Fieri facias*, Writ of Assistance, or any other Writ of the like Kind issue directed to the Sheriff, and he or any of his Officers be killed in the Execution of it, it is sufficient upon an Indictment for this Murder to produce the Writ and Warrant, without shewing the Judgment or

SECT. 8.

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ple.

Decree. So ruled by Lord *Hardwicke* in the Case of one *Rogers** at the Summer Assizes in *Cornwall* in the Year 1735.

AND in the Case of a Warrant from a Justice of the Peace in a Matter wherein he hath Jurisdiction, the Person executing such Warrant is in like manner under the special Protection of the Law; though such Warrant may have been obtained by gross Imposition on the Magistrate, and by false Information touching Matters suggested in it. See the Case of *Richard Curtis* before reported.

SECT. 9. SECT. 9. BUT if the Process be defective in the Frame of it, as if there be a Mistake in the Name or Addition of the Person on whom it is to be executed, or if the Name of such Person, or of the Officer be inserted without Authority, and after the Issuing of the Process, or the Officer exceedeth the Limits of his Authority, and is killed, this will amount to no more than Manslaughter in the Person whose Liberty is so invaded.

How far other Persons, especially meer Strangers, interposing in Behalf of the Party whose Liberty is invaded will be intitled to the same Indulgence, deserveth great Consideration.

SECT. 10.
Lord Raym.

SECT. 10. THE Doctrine advanced in the Case of the Queen against *Tooly* and others hath, I conceive, carried the Law in Favour of private Persons *officially* interposing farther than sound Reason founded in the Principles of true Policy will warrant. I say *officially* interposing, because the Interposition of private Persons in the Cases I have mentioned, for preserving the Peace and preventing Bloodshed, standeth upon a quite different Foot.

IN *Tooly's* Case, the Imprisonment of the Woman was certainly unjustifiable. The Constable † was out of his

* This Man by the Help of a Gang of desperate Fellows stood out a long Time in a Chancery-Suit, and kept Possession of the Premises in Question against all Manner of Process. At length the Sheriff attended by the *Peffe Comitatus* endeavouring to execute the Process, three of the *Peffe* were killed by him or some of his Gang, he present and abetting. For these Murders he was tried and convicted. In the Course of the Trials the Writ of Execution, the Injunction for delivering Possession, and the Writ of Assistance were read in Evidence, but not the Decree. The Judge being apprehensive of a Rescue, he was by special Order executed the next Day.

† I use the Term Constable meerly for the Sake of Brevity, for the Man was no Constable in the Precinct where the Arrest and Imprisonment were.

Precinct, and had no special Warrant for what he did; nor had the Woman at that Time misbehaved. His Assistant therefore was not under the special Protection of the Law I have mentioned. But whether this illegal Imprisonment was in the Eye of the Law a sufficient Provocation to the Defendants, *who were Strangers to her and her Case*, is yet to be considered; for all voluntary felonious Homicide without a Provocation is undoubtedly Murder.

It was held by seven of the Judges against five, that it was a sufficient Provocation. For, said *Holt* in giving Judgment, "if one be imprisoned upon an unlawful Authority, it is a sufficient Provocation to all People out of Compassion, much more when it is done under Colour of Justice; and where the Liberty of the Subject is invaded, it is a Provocation to all the Subjects of England.—A Man ought to be concerned for *Magna Charta* and the Laws. And if any one against Law imprison a Man, he is an Offender against *Magna Charta*."

THE Cases of Sir *Henry Ferrers's* Servant and of *Hopkin Hugget* were cited by the Chief Justice in his Argument, and greatly relied on. But those Cases do not in my Opinion warrant the Doctrine in the Latitude here laid down.

IN the former, a Quarrel arising between the Servant and the Officer after Sir *Henry* had submitted to the Arrest and was put into a Place of Security, they fought and the Officer in this Affray was killed. It doth not appear upon what Provocation the Quarrel and Affray began, and the Report maketh it highly probable that no Rescue was thought of or attempted. The Words are, "The Servant in seeking to rescue him AS WAS PRETENDED killed the Officer."

Cro. Car:
371.

If the Matter of the Rescue was a meer Pretence, and for aught appeareth by the State of the Case it was no more than a Pretence, the Case was clearly Manslaughter, Homicide upon a sudden Affray; without entering into the Question touching the Insufficiency of the Writ or Warrant. The Reporter doth indeed mention this Matter as an Ingredient in the Case; but general Rules thrown out in Argument, and carried farther than the true State of the Case then in Judgment requireth, have, I confess, no great Weight with me.

I do

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I do not say that incompetent Reasons, where better might have been given, derogate from the Authority of the Judgment; but they certainly derogate from the Authority of the Rule upon which the Judgment is supposed to be founded.

1. Hale 465.

HUGGET's Case likewise as stated by *Hale* was clearly Manslaughter; a sudden Quarrel and Affray, and a Combat between him and an Assistant of the Press-Master upon some Rudeness *offered or supposed to be offered on the Part of the Assistant*; "upon which," saith *Hale*, "a Quarrel arose between them," and in the End the Assistant was killed.*

I take the Liberty of observing as I go on, that *Hale* who at the Conference concurred with those who were of Opinion that the Case amounted to Manslaughter only, doth not say a Syllable touching the Provocation which an Act of Oppression towards Individuals might be supposed to give to the Bystanders. And he certainly representeth the Case in the Light it appeared to him at that Time, *as a sudden Quarrel upon some Rudeness offered by the Press-master's Assistant.*

Keil. 59.

THE Case as it is reported by *Keiling* doth indeed turn upon the Illegality of the Impress, and the Provocation such an Act of Oppression may be presumed to give to every Man, be he Stranger or Friend, out of meer Compassion *to endeavour a Rescue*. And say the major Part of the Judges, if in such *Endeavour* of Rescue they kill any one, such Killing will be Manslaughter.

IN this Case the Judges were divided in Opinion, four that it was Murder, eight that it was Manslaughter †.

SECT. II.

SECT. II. WITHOUT entering at present into the Merits of this Case, I think *Tooly's* differed widely from it. In this, Swords were drawn, and a mutual Combat ensued. The Blood was overheated in the Affray before a mortal Wound was given. In *Tooly's*, the Soldiers at the first

* *Keiling* saith Swords were drawn on both Sides, and they fought.

Keil. 60, 62.

† The Judges said at the Conference, *That as then advised they were of that Opinion; but they would not be bound by it.* The Reporter and the other Judges of the King's-Bench, after hearing Council upon the special Verdict, adhered to their former Opinion, that it was Murder. But out of Deference to the Majority they admitted the Defendant to his Clergy.

first Meeting with the Constable drew their Swords upon him unarmed against such Weapons; but they soon put them up appearing to be pacified, and cool Reflection seemed in some Measure to have taken Place. At the second Meeting the Deceased received his Death's Wound before a Blow was given, or, for aught appeared, offered on the Part of him or any of his Party.

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IN *Hugget's* Case a Rescue seemed to be practicable at the Time the Affray began. And it is observable that the Judges who held it to be Manlaughter put the Point upon an *Endeavour to rescue*. I will not say that the Possibility of a Rescue was a sufficient Motive to endeavour at it, but still there was a Possibility which might induce the Men to attempt it. But in *Tooly's* the Case was quite otherwise, unless the Soldiers could hope to force the Roundhouse. For the Woman was there secured before the second Encounter, and before the Deceased appeareth to have taken any Part in the Affair. So that the second Assault on the Constable seemeth rather to have been grounded upon Resentment or a Principle of Revenge for what had before passed, than upon any Hope or Endeavour to assist the Woman.

SECT. 12. I have been longer on this Case than I should have been, had not I thought the Doctrine advanced in it utterly inconsistent with the known Rules of Law touching a sudden Provocation in the Case of Homicide; and, which is of more Importance, inconsistent with the Principles upon which all civil Government is founded and must subsist.

SECT. 12.

THE Indulgence shewn to the first Transport of Passion in these Cases is plainly a Condescension to the Frailty of the human Frame, to the *Furor brevis*, which while the Frenzy lasteth rendereth the Man deaf to the Voice of Reason. The Provocation therefore which extenuateth in the Case of Homicide must be something which the Man is conscious of, which he feelth and resenteth at *the Instant the Fact which he would extenuate is committed*; not what Time or Accident may afterwards bring to Light. Now what was the Case of *Tooly* and his Accomplices stript of a Pomp of Words and the Colourings of artificial Reasoning?

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ing? They saw a Woman, for aught appears a *perfect Stranger to them*, led to the Roundhouse under a Charge of a criminal Nature. This upon Evidence at the Old Bayly a Month or two afterwards cometh out to be an illegal Arrest and Imprisonment, a Violation of *Magna Charta*; and these Ruffians are presumed to have been seized all on a sudden with a strong Fit of Zeal for *Magna Charta* and the Laws, and in this Frenzy to have drawn upon the Constable and stabbed his Assistant.

It is extremely difficult to conceive that the Violation of *Magna Charta*, a Fact of which they were totally ignorant at that Time, could be the Provocation that led them into this Outrage.

BUT admitting for Argument Sake that it was, we all know that Words of Reproach, how grating and offensive soever, are in the Eye of the Law no Provocation in the Case of voluntary Homicide. And yet every Man who hath considered the human Frame, or but attended to the Workings of his own Heart, knoweth that Affronts of that Kind pierce deeper and stimulate in the Veins more effectually than a slight Injury done to a third Person, though under Colour of Justice, possibly can. The Indignation that kindleth in the Breast in one Case is instinct, it is human Infirmary. In the other, it may possibly be called a Concern for the common Rights of the Subject, but this Concern when well founded is rather founded in Reason and cool Reflection than in human Infirmary. And it is to human Infirmary alone that the Law indulgeth in the Case of a sudden Provocation.

SECT. 13.

SECT. 13. BUT if a Passion for the common Rights of the Subject in the Case of Individuals must against all Experience be presumed to inflame beyond a personal Affront, let us suppose the Case of an upright and deserving Man, universally beloved and esteemed, standing at the Place of Execution under a Sentence of Death *manifestly unjust*. This is a Case that may well rouse the Indignation, and excite the Compassion of the wisest and best of Men. But wise and good Men know, that it is the Duty of private Subjects to leave the innocent Man to his Lot, how hard soever it may be, without attempting a Rescue; for other-
wise

wife all Government would be unhinged. And yet, what C H A P.
Proportion doth the Case of a false Imprisonment for a VIII.
short Time, and for which the Injured Party may have
an adequate Remedy, bear to that I have now put?

SECT. 14. WHAT I have now said suggesteth a SECT. 14.
Thought which I will mention, and submit to further
Consideration.

I am firmly perswaded that in Cases such as these, a general Submission to the known Badges of Authority exacted from all Persons Strangers to the Party supposed to be injured or his Cause, would greatly conduce to the Stability of Government; in the Fate of which all private Rights are involved. On the other Hand an undue Countenance given to a Spirit of popular Opposition upon the Principles of FALSE PATRIOTISM hath a fatal Tendency to loosen the Reins of Government, and to throw Matters into general Confusion.

THIS is a Consideration of great Importance; and if the Reader will apply it to the Cases of *Hugget* and *Tooly* and the Reasoning on them, he will not find it difficult to determine on which Side the Justice of the Case, that Justice I mean which is due to the Publick, doth preponderate.

THERE is undoubtedly a Justice due to the Community founded in the Interest every Individual hath in the Publick Tranquillity; which once destroyed, all private Rights will sink and be absorbed in the general Wreck. And if the common Rights of the Subject are supposed to be the Object in View, (it is an Object which deserveth the Attention of all wise and good Men at proper Seasons, and under those Limitations which Wisdom and a just Concern for the Publick will suggest), let it be remembered, that Liberty is never more in Danger than when it vergeth into Licentiousness. *Cæsar* cherished a Spirit of licentious Popularity against the Senate, *Cromwell* cherished the same Spirit against Crown and Senate; both set up a Tyranny of their own subversive of true Liberty, which ever must be founded in Law, and protected by it.

THESE Considerations have led me into a free and perhaps too prolix Examination of the Opinions of learned Men,

CHAP. VIII. Men, whose Merit I esteem, and to whose Memory I shall constantly pay a proper Regard.

SECT. 15. SECT. 15. IN the Case of private Persons using their Endeavours to bring Felons to Justice, these Cautions ought to be observed.

Cro. Jac. 194. 2. Inst. 53. 172. THAT a Felony hath been actually Committed. For if no Felony hath been Committed, no Suspicion how well soever grounded will bring the Person so interposing within the Protection of the Law in the Sense I have already stated and explained.

SECT. 16. SECT. 16. SUPPOSING a Felony to have been actually committed, but not by the Person arrested or pursued upon Suspicion, this Suspicion though probably well founded will not bring the Person endeavouring to arrest or imprison within the Protection of the Law, so far as to excuse him from the Guilt of Manslaughter, if he killeth or on the other Hand to make the killing of him amount to Murder. I think it would be felonious Homicide, but not Murder, in either Case. The one not having used due Diligence to be apprized of the Truth of the Fact, the other not having submitted and rendered himself to Justice; since if his Case would bear it, he might have resorted to his ordinary Remedy for the false Imprisonment.

SECT. 17. SECT. 17. BUT if *A.* being a Peace-Officer hath a Warrant from a proper Magistrate for the Apprehending of *B.* by Name upon a Charge of Felony, or if *B.* standeth indicted for Felony, or if the Hue and Cry be levied against *B.* by Name, in these Cases if *B.* though innocent flieth, or turneth and resisteth, and in the Struggle or Pursuit is killed by *A.* or any Person joining in the Hue and Cry, the Person so killing will be Indemnified. And on the other Hand, if *A.* or any Person joining in the Hue and Cry is killed by *B.* or any of his Accomplices joining in that Outrage, such Occision will be Murder. For *A.* and those joining with him were in this Instance in the Discharge of a Duty the Law requireth from them, and subject to Punishment in Case of a wilful Neglect of it.

SECT.

SECT. 18. WITH REGARD to the Ministers of Justice executing the ordinary Process of the Law, and likewise to private Persons endeavouring to arrest or imprison in the Cases I have mentioned, it behoveth them to be very careful that they do not misbehave themselves in the Discharge of their Duty; for if they do they may forfeit this special Protection I have been speaking of. *

ONE Instance of their Misbehaviour, which hath been the Subject of Litigation, is that of breaking open Windows or Doors in order to arrest. And as this is a Matter of general Concern, I will be a little more particular, though brief, upon it.

SECT. 19. THE Officer cannot justify the breaking open an outward Door or Window in order to execute Process in a Civil Suit. If he doth he is a Trespasser. But if he findeth the outward Door open, and entereth that Way, or if the Door be opened to him from within, and he entereth, he may break open inward Doors if he findeth *that* necessary in Order to execute his Process.

THE Books say, that a Man's House is his Castle for Safety and Repose to himself and Family; and consequently the Officer in the Case I have put, being a Trespasser, cannot be said to be acting in the Discharge of his Duty, at the Time and in the very Instance in which he is committing a Trespass. These Suppositions are inconsistent, and destroy each the other. But if he findeth the Door open, or gaineth Admission from within, he having a lawful Call to the Place, as he certainly hath, cannot be a Trespasser in entering the House, and consequently may remove any Obstruction he meeteth with in prosecuting the Business he came about.

SECT. 20. THE Rule that every Man's House is his Castle, when applied to the Case of Arrests upon legal Process, hath been carried as far as the true Principles of political Justice will warrant. Perhaps beyond what in the Scale of sound Reason and good Policy they will warrant.

But

* See Chap. 6. on the Statute of Stabbing, the Case of a Bayliff who pushed violently and abruptly into a Gentleman's Chamber in order to arrest Him.

CH A P. VIII. But in Cases of Life we must adhere to Rules well-known and long established. •

BUT this Rule is not one of those that will admit of any Extension. It must therefore, as I have before hinted, be confined to the Breach of Windows and outward Doors, intended for the Security of the House against Persons from without endeavouring to break in.

SECT. 21. **5. Co. 93.** SECT. 21. It must likewise be confined to a Breach of the House in order to Arrest *the Occupier or any of his Family* who have their Domicile, their ordinary Residence there. For if a Stranger whose ordinary Residence is elsewhere, upon a Pursuit taketh Refuge in the House of another this is not *his* Castle, he cannot claim the Benefit of Sanctuary in it.

SECT. 22. **Salk. 79.** **6. Mod. 173.** **Lord Raym. 1028.** SECT. 22. THE Rule is likewise confined to the Case of Arrests *in the first Instance*. For if a Man being legally arrested (and laying Hold of the Prisoner and pronouncing the Words of Arrest is an actual Arrest) escapeth from the Officer, and taketh Shelter though *in his own House*, the Officer may upon fresh Suit break open Doors in order to retake him, having first given due Notice of his Business and demanded Admission, and been refused.

AND let it be remembered that not only in this but in every Case where Doors may be broken open in order to arrest, whether in Cases criminal or civil, there must be such Notification, Demand and Refusal, before the Parties concerned proceed to that Extremity.

SECT. 23. SECT. 23. THE Rule already mentioned must likewise be confined to the Case of Arrests upon Process in Civil Suits. For where a Felony hath been committed or a dangerous Wound given, or even where a Minister of Justice cometh armed with Process founded on a Breach of the Peace the Party's own House is no Sanctuary for him; Doors may in any of these Cases be forced, the Notification, Demand, and Refusal before-mentioned having been previously made.

IN these Cases the Jealousy with which the Law watcheth over the Publick Tranquillity, (a laudable Jealousy it is), the

the Principles of political Justice, I mean the Justice which is due to the Community *Ne Maleficia remaneant impunita*, all conspire to supersede every Pretence of private Inconvenience; and oblige us to regard the Dwellings of Malefactors when shut against the Demands of Publick Justice, as no better than the Dens of Thieves and Murderers, and to treat them accordingly.

BUT bare Suspicion touching the Guilt of the Party will not warrant a Proceeding to this Extremity, though a Felony hath been actually committed; unless the Officer cometh armed with a Warrant from a Magistrate grounded on such Suspicion.

SECT. 24. GOALERS and their Officers are under the same special Protection that other Ministers of Justice are. And therefore if in the necessary Discharge of their Duty they meet with Resistance, whether from Prisoners in Civil or Criminal Suits, or from others in behalf of such Prisoners, they are not obliged to retreat as far as they can with Safety, but may freely and without retreating repel Force with Force. And if the Party so resisting happeneth to be killed, this on the Part of the Goaler, or his Officer, or any Person coming in Aid of him will be justifiable Homicide. On the other Hand, if the Goaler, or his Officer, or any Person coming in Aid of him should fall in the Conflict, this will amount to wilful Murder in all Persons joining in such Resistance. It is Homicide committed in Defiance of the Justice of the Kingdom. S E C T. 24.

SECT. 25. BUT in regard to the great Power these Officers have, and, while it is exercised with Moderation ought to have over their Prisoners, the Law watcheth with a jealous Eye over *their* Conduct. And therefore if a Prisoner under their Care dieth, whether by Disease or Accident the Coroner upon notice of such Death, which notice the Goaler is obliged to give in due Time, ought to resort to the Goal, and there upon view of the Body make Inquisition into the Cause of the Death. And if the Death was owing to cruel and oppressive Usage on the Part of the Goaler or any Officer of his, or, to speak in the Language of the Law, to *Duress of Imprisonment*, it will be deemed wilful S E C T. 25.

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wilful Murder in the Person guilty of such Durefs. I say *the Person guilty of the Durefs*, because though in a Civil Suit the Principal may in some Cases be answerable in Damages to the Party injured through the Default of the Deputy upon the Principle of *Respondeat Superior*; yet in a Capital Prosecution, the sole Object of which is the Punishment of the Delinquent, each Man must answer for his own Acts or Defaults.

Stra. 856.

THE Instances of Oppression which may fall within the Rule of Durefs of Imprisonment are as various as a Heart cruelly bent upon Mischiefe can invent. I will mention two which have lately come in Judgment. A Goaler knowing that a Prisoner infected with the Small Pox lodged in a certain Room in the Prison, confined another Prisoner *against his Will* in the same Room. The second Prisoner who had not had the Distemper, *of which the Goaler had notice*, caught the Distemper, and died of it. This was very rightly held to be Murder in the Goaler.

Ibid. 884.

ANOTHER straitly confined his Prisoner in a low damp unwholesome Room without allowing him the common Necessaries of Chamber Pot &c. for keeping Things sweet and clean about him. The Prisoner having been long confined in this Manner contracted an ill Habit of Body, which brought on Distempers of which he died. This likewise was very rightly held to be Murder in the Party guilty of this Durefs.

THESE were deliberate Acts of Cruelty, and enormous Violations of the Trust the Law reposes in it's Ministers of Justice.

HAVING, as I observed in the Beginning of this Chapter, already considered the Cases of Murder which fall in and are connected with the lower Species of Homicide, I have now gone as far into the Subject of Murder in general as I propose at present. For I forbear to enter in this Place into a minute Consideration of the Case of Principals in the first and second Degrees in Murder, and also of those who may be deemed Accessaries before or after the Fact; intending to consider those Matters at large under the Head of *Accomplices*. Upon which Occasion something will be said in general touching the *Participes Criminis* in the Case of High Treason and other Capital Offences.

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CHAP. IX.

Of Petit Treason.

HAVING said as much I think necessary to say in this Place upon the Subject of Murder in general, I come now to speak of that aggravated Kind of Murder which our Law hath distinguished by the Name of *Petit Treason*.

FORMER Writers following the Order they found in the Statute of Treasons have generally chosen to treat of Petit, immediately after High Treason, before they enter into the Consideration of any other Species of Homicide. I suspect that this Circumstance, small as it may seem, hath contributed to lead unwary People into an Opinion that Petit Treason is in Consideration of Law an Offence of *a different kind* from Murder. I have therefore in treating on the Subject of Homicide chosen to begin with the lowest Species, and following the Order of Law to rise gradually to Murder. And shall conclude with what I take to be in Consideration of Law the highest Degree of that Offence, Murder aggravated by Circumstances of a treasonable kind.

I shall not enter into a Detail of the several Cases provided for by that Clause in the Statute of Treasons, which relateth to this Offence; nor of those which by Construction have been brought within it. This Part of the Subject hath been sufficiently spoken to by Writers who have gone before me, and to them I refer the Reader.

I shall content myself with enquiring, and stating with as much Precision as I can, in what Respects the Law considereth this Offence as meer Murder, and in what Respects it may fall under a different Consideration.

SECT. 1. AN Appeal of Death will lie in the Case of Petit Treason, as well as in every other Case of Murder; and the Appeal chargeth that the Defendant *Felonice, Pro-Jones (W.) ditorie & ex Malitiâ præcogitatâ Murdravit..* And in the Case of a Wife killing her Husband, the Heir shall have the Appeal, and she, if convicted, shall be burnt.

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IX.S E C T. 2.
1. Hale 382.

S E C T. 2. If the Defendant on Arraignment standeth mute, or refuseth to plead, or peremptorily challengeth above 35, he shall suffer the *Pain fort & jure* as in Case of other Felonies.

S E C T. 3.

1. Hale 378.

S E C T. 3. PETIT Treason is considered as a Species of Felony. And therefore at Common-Law, and before the Statute of 13. *Rich.* 2. interposed, a Pardon of Felony without the Exception of Petit Treason pardoned that Offence. And at this Day a Pardon of Murder doth the same.

Dyer. 235.
2. Hale 340.

HALE seemeth to have been *once* of Opinion that the Exception of Murder in a Statute Pardon, by which all Felonies are pardoned, without an exprefs Exception of Petit Treason, will not except Petit Treason; and that that Offence will be pardoned. This he groundeth on an Opinion in *Dyer*. But afterwards upon further Consideration he totally rejecteth that Notion.

THE Opinion in *Dyer* is grounded on a Misconception of the true Scope and Intent of the Act* of General Pardon of the 5. *Eliz.* by which all Treasons and other Offences are pardoned by very general Words with an Exception of some Particular Species of High Treason, and of ALL MANNER of *Voluntary Murders*, &c. without any exprefs Exception of Petit Treason *eo Nomine*. But in this Respect there is nothing very singular in this General Pardon. For except that of the 50. *Edw.* 3. which hath an Exception of all Treasons whatsoever, there is not one before the 13. *Eliz.* which hath any general Exception applicable to the Case of Petit Treason; unless it be comprehended in the Exception of Voluntary Murder, *which is expressly excepted in all of them.*

It would be absurd to imagine that Petit Treason, the most aggravated Kind of Murder in the Eye of the Law, was intended to be pardoned by these Acts, 12 in Number, passed at different Times in the Compass of about 200 Years. And it would be equally absurd to suppose that if it was not intended to be pardoned, no Care was taken

* The Acts of General Pardon are printed at large in *Rastal's Statutes*, and in all the Editions antierour to that Collection.

taken to except it. And yet all these Acts have pardoned Petit Treason, if it be not excepted under the Denomination of *wilful Murder*. From whence I think it may be safely inferred, that in the Judgment of those Parliaments the Offence of Petit Treason was excepted under the Exception of *wilful Murder*.

THE Exception of Petit Treason, *eo Nomine*, was first introduced by the 13. *Eliz.* probably *ex abundanti Caute-lâ* and with a View to this Opinion in *Dyer*; and it hath been inserted, together with the Exception of wilful Murder, in all the Acts of general Pardon from that Time to the present. But it cannot be inferred from these later Acts that such an exprefs Exception was absolutely necessary, without supposing either that our Ancestors for about 200 Years together intended to pardon Petit Treason *while they constantly excepted wilful Murder*, or that they did not know how to except it in a proper manner.

THERE is a Case in *Dyer* which hath been thought to Dy. 50. favour the Opinion that the Crime of Murder is merged in 33. H. 8. Petit Treason, and that a Pardon of Treason discharged it, notwithstanding the Exception of Murder. But that Case proveth nothing like it. A Wife about the 31. H. 8. poisoned her Husband; then came a general Pardon, by which Treason was pardoned, but with an Exception of wilful Murder. The Heir brought an Appeal of Murder, and it was adjudged that the Appeal did not lie. This Case doth not prove that Murder is merged in Petit Treason, but that both Murder and Petit Treason were merged and extinguished in the Offence of High Treason. For at that Time by Virtue of the 22. H. 8. *all wilful poisoning was* 22. H. 8. c. 9. *Higb Treason*. And being so, the Appeal * not being saved in Rastal. by the Act was barred, whether the Treason had been pardoned or no.

SECT. 4. A Person guilty of Petit Treason may be indicted of Murder, *for it is a Species of Murder*; and such Facts and Circumstances proved in the Manner the Statutes hereafter cited require, as would convict a Man of Murder will convict a Wife or Servant of Petit Treason. And

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on

* Vid. 8. *Edw.* 4. an Attempt to make Sacrilege High Treason, and the Offender to be burnt. The Appeal for Restitution exprefsly saved. *Cott.* 684.

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1. Hale 378.
2. Hale 184.

6. St. Tri.
224.

1. Hale 378.

on the other Hand, upon an Indictment for Petit Treason the Jury may find, as the Circumstances tending to justify, excuse, or alleviate, come out in Evidence, in the same Manner as they do upon an Indictment for Murder.

WHILE the Case of the King against *Swan* reported before was depending, and before the second Bill was preferred, a Question was made whether *Swan* could be convicted on the Indictment for Murder, if it should come out in Evidence that he was Servant to the deceased at the Time the Fact was contrived or committed; and consequently that his Offence was Petit Treason.

THERE is a Case cited in the printed Trial of *Coke* and *Woodburne*, which, if such Case there ever was, hath as far as the Authority of it goeth determined that Question. "At the Summer Assizes at *Dorchester* 1712, a Woman was indicted before Mr. Justice *Eyre** for the Murder of another Woman; upon Evidence it appeared that the Person murdered was her Mistress, which made the Crime Petit Treason. The Judge directed this Matter to be specially found; and upon Conference with all the Judges it was held she ought to be acquitted upon this Indictment, as she accordingly was, and was afterwards indicted for Petit Treason, and convicted and executed." This Case is not to be found in any Report printed or MS. that I have met with, or heard of. Nor have I upon a strict Inquiry met with any Footsteps of such Case among the Minutes of Proceedings on the Crown Side in the County where the Case is supposed to have arisen; though the Minutes from 1708 to 1722 have been carefully searched. For these Reasons and what is suggested in the marginal Note I conclude that no such Case ever existed.

LORD Chief Justice *Hale* is very full and expresses on the other Side of the Question. "A Person who is guilty of Petit Treason may be indicted of Murder, for it is a Species of Murder, and a Pardon of Murder pardoneth Petit Treason."

* Justice *Eyre* did not go the western Circuit in the Summer 1712. *Ward* and *Price* went at that Time. This Information I have from Mr. *Maddock* Clerk of Assize of the western Circuit.

LORD Chief Justice *Coke* having cited the Opinion in *Dyer* 235 before mentioned saith, "*That Petit Treason is Murder and more.*" And from thence it hath been inferred that Petit Treason and Murder are in Consideration of Law different Offences, or that the Crime of Murder is merged in Petit Treason. But this Inference will not hold, however true the Chief Justice's Doctrine may be. There is undoubtedly in Consideration of Law a greater Degree of Malignity in the one than in the other arising from that Degree of Allegiance, however low, which the Murderer owed to the Deceased at the Time the Fact was committed or conceived in his Heart. But certainly the Difference in Point of Malignity between Murder and Manslaughter is infinitely greater; and consequently in that Respect it may with equal Propriety be said that *Murder is Manslaughter and more.* And yet in Judgment of Law they are the same Offence differing only in the Degree of Malignity when considered in Relation to one and the same Fact. And by a Parity of Reason Lord Chief Justice *Hale* concludeth, that Petit Treason and Murder are to be considered in the same Light, as one Offence, differing only in Degree.

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6. Co. 13. b.

4. R. 46.

Keil. 103,

104.

2. Hale 251.

BUT though I am satisfied that the Law considereth Petit Treason and Murder as one Offence differing only in Circumstance and Degree, yet whether it may be advisable to proceed upon an Indictment for Murder against a Person plainly appearing to be guilty of Petit Treason is a Matter that deserveth great Consideration; and probably determined the Attorney-General to prefer a fresh Bill for Petit Treason in *Swan's Case*. For though the Offences are to most Purposes considered as substantially the same, yet as there is some Difference between them with regard to the Judgment that is to be pronounced upon a Conviction, and a very material one with regard to the Trial, a Person indicted for Petit Treason *being intitled to a peremptory Challenge of 35*, I think if the Prosecutor be apprized of the true State of the Case, as he may be if he useth due Diligence, he ought to adapt the Indictment to the Truth of the Fact.

BUT if through a Mistake on the Part of the Prosecutor, or through the Ignorance or Inattention of the Officer, a Bill be preferred as for Murder, and it should come out in

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Evidence that the Prisoner stood in that Sort of Relation to the Deceased which rendereth the Offence Petit Treason, I do not think it by any Means advisable to direct the Jury to give a Verdict of Acquittal. For a Person charged with a Crime of so heinous a Nature ought not to have the Chance given him by the Court of availing himself of a Plea of *Auterfoits Acquit*. In such a Case I should make no Sort of Difficulty of discharging the Jury of that Indictment, and ordering a fresh Indictment for Petit Treason. In this Method the Prisoner will have Advantage of his peremptory Challenges, and the publick Justice will not suffer. And on the other Hand, in Case of an Indictment for Petit Treason, if it be proved that the Defendant killed the Deceased with such Circumstances of Malice as amount to Murder, but the Relation of Servant &c. is not proved, I have no Sort of Doubt that on such an Indictment the Defendant may be found guilty of Murder and acquitted of the Treason. For Murder is included in every Charge of Petit Treason, *Felonice, Proditorie & ex Malitiâ præcogitatâ* MURDRAVIT.

THE Treason is a Circumstance of Aggravation of which the Defendant may be acquitted, and yet found guilty of the substantial Part of the Charge; just as a Man upon an Indictment of Murder may be acquitted of that and found guilty of Manslaughter. "Because," say the Books, "Manslaughter is included in the Charge of Murder."

I will go one Step further; I offer it as my private Opinion which is submitted to the Judgment of the Learned. Put the Case that a Person is brought to his Trial upon an Indictment for Petit Treason, and that one Witness only can be produced, or that the Prosecutor is not furnished with any Evidence except the Depositions taken before the Coroner, or Informations taken on Oath before Justices of the Peace pursuant to the Statutes; and let it be supposed that those Witnesses *are living but unable to travel, or kept out of the Way by the Procurement of the Defendant*. What is to be done in this Case? is the Defendant to be acquitted of the whole Charge? I think not. I think this Evidence, though not sufficient to convict of Petit Treason, is still admissible Evidence, and proper to be left to the Jury as upon a Charge of Murder; and the Jury, if they

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1. Hale 378.

2. Hale 184.

1. 2. Ph. and
M. 13.

2. 3. Ph. and
M. 10.

Vid. Keil.

55.

1. Hale 305.

2. Hale 284.

Vid. Sect. 10.

are satisfied, may find the Defendant guilty of the Murder, and acquit him of the Treason, for the Reasons just now given.

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2. Hale 184.

Interest Reipublicæ ne Maleficia remaneant impunita.

SECT. 5. A Wife or Servant joining with a Stranger in the same Murder may be charged in one Indictment, which could not be if their Offences were not substantially the same; and such Indictment concluding, that they *Felonice, Proditorie & ex Malitiâ præcogitatâ Murdraverunt* is good for both, *Reddendo singula singulis.*

SECT. 5.

Dalison 16,
and Swan's
Case.

SECT. 6. AUTERFOITS *acquits* or *attaint* upon an Indictment for Murder is a good Bar to an Indictment for Petit Treason for the same Fact, and so *è converso.*

SECT. 6.
2. Hale 246.
252.
3. Inst. 213.

SECT. 7. THE 1. *Edw. 6.* which ousteth Clergy in the Case of wilful Murder, extendeth to Petit Treason and ousteth that likewise, though Petit Treason is not *eo Nomine* ousted, and notwithstanding the Statute restoreth Clergy to all Offences not therein enumerated which were intitled to it before the 1. *H. 8.*; for *Petit Treason is a Species of Murder.*

SECT. 7.

LORD Hale is clearly of this Opinion, and putteth a Case which is not provided for by either of the Acts of *H. 8.* and yet in his Judgment cometh within the 1. *Edw. 6.* it is the Case of an Outlawry. And he saith, "In my Opinion the Statute of 1. *Edw. 6.* taking away Clergy from Persons *attaint* as well as from Persons *convict* of Murder doth extend to Petit Treason, *which in Truth is Murder.* And consequently a Person outlawed of Petit Treason, though not by the Statutes of the 23. or 25. *H. 8.* yet by the Statute of *Edw. 6.* is exempt from Clergy under the Name of wilful Murder."

2. Hale 342.

THE only use I make of this Passage, for his Lordship hath not here considered all the Statutes touching Petit Treason with his usual Accuracy, is to shew that his Lordship considered Petit Treason meerly as a Species of Murder. And whoever will read the Statute of the 12. *H. 7.* cited underneath with any Attention will see that the Legislature

C H A P. IX. signature considered it in no other Light than as an *aggravated Murder*.

THERE is another Case which I think is not provided for by any of the Acts antierour to that of *Edw. 6.* and must be wholly resolved into that Act. It is the Case of Petit Treason committed by a Person in holy Orders.

12. H. 7. c. 7. The Statute of *H. 7.* is confined to lay Persons. The Words are, "If any lay Person murder, &c." The 23. *H. 8.* expressly excepteth Persons in holy Orders, viz. of the Order of Subdeacon or above. And the 25. *H. 8.* is evidently confined to Persons indicted and arraigned according to the Statute of the 23^d. And therefore unless Petit Treason committed by a Person in holy Orders is ousted by the 1. *Edw. 6.* under the name of wilful Murder, it remaineth, for aught I see, still intitled to Clergy.

SECT. 8. I know an Opinion hath been entertained by some learned Men, that Principals in Petit Treason may be ousted of Clergy without supposing Petit Treason to be comprehended in the 1. *Edw. 6.* under the Denomination of wilful Murder. For they think that the whole Act of the 25. *H. 8.* before cited is revived by the 5. and 6. *Edw. 6.* according to the Opinion of Lord *Coke* in *Powlter's Case*, but that Opinion is not well founded. *Hale* was once of the same Opinion touching the Revival of the 25. *H. 8.* *in toto* and grounded himself on the Authority of *Powlter's Case*,* who was denied his Clergy upon a Conviction for the wilful and malicious Burning a House at *Newmarket* whereby the greatest Part of the Town was consumed.

BUT in his second Volume he resumeth the Consideration of that Case and totally rejecting *Coke's* Opinion touching the Revival of 25. *H. 8.* *in toto*, concludeth that no Part of that Act was revived, except the Clause concerning Felons convicted of Larceny in one County where the Goods came into their Possession by Robbery or Burglary in another; and resteth the Authority of *Powlter's Case* upon a much safer Bottom.

* See his Summary p. 232, to 235, and History 1. Vol. 570, to 574.

I will for the Reader's Satisfaction state the several Acts C H A P. mentioned in *Powlter's Case* as shortly as I can, but so as IX. to avoid Obscurity.

THE 23. H. 8. ousted Clergy in certain Cases therein 23. H. 8. c. 1. enumerated, among which the Offence *Powlter* stood Sec. 3. charged with is one. This Act extended to Principals and Accessaries before the Fact, being convicted by *Verdict* or *Confession*. But did not reach the Case of Persons wilfully standing mute or challenging peremptorily above twenty, or refusing to plead directly to the Indictment.

To remedy this Defect the 25. H. 8. ousteth such Of- 25. H. 8. c. 3. fenders standing mute of Malice, or challenging perempto- S. 2. rily above twenty, or refusing to answer the Indictment, in like manner as if they had pleaded *Not Guilty*, and had been found guilty according to the Laws of the Land.

THUS far this Statute was meerly auxiliary to the former: it barely provided for Cases falling within the same Rule of distributive Justice, but omitted in the former Act, probably through meer oversight.

IT then proceedeth in the 3^d. Section to a Case of a Ibid. S. 3. quite different Nature and entirely new; and enacteth that Persons coming to the Possession of Goods by Robbery or Burglary in one County, and taken with the *Manner* in another, and there indicted of Larceny, shall be ousted in the same Manner as if they had been indicted of Robbery or Burglary in the proper County: if it shall appear upon Examination that the Goods were originally taken by Robbery or Burglary.

THE 1st of *Edw. 6th* ousted Clergy in certain Cases 1. E. 6. c. 12. therein enumerated, and for the most Part provided for by S. 10. the 23. H. 8. but is totally silent as to the Offence of wilful *Burning of Houses*. And even with regard to the enumerated Offences, doth not extend to Accessaries before the Fact. And further enacteth, that, "In all other Cases of *Felony*, all Persons shall have the Benefit of Clergy as they might have had before the 24th Day of *April* in the 1st Year of King *Hen.* the 8th." which was the Day he began his Reign.

WILFUL Burning of Houses therefore which had been ousted by the 23^d and 25th of *Hen.* the 8th was restored to Clergy by this Clause. And so were Accessaries before the Fact

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Fact in all the Offences therein enumerated. And Persons coming to the Possession of Goods by Robbery or Burglary in one County and convicted of Larceny of the same Goods in another were likewise restored to Clergy. And from this Clause and the Act next cited the Doubt in *Powlter's Case* arose.

5. 6. E. 6.
c. 10.

THE 5th and 6th of *Edw.* the 6th, reciting that the 23^d of *H.* 8. did not extend to Persons committing Robbery or Burglary in one County and taken with the *Manner* in another and there indicted of Larceny; and reciting also the Clause in the 25th of *Hen.* the 8^h already cited, which had ousted those Offenders: and further reciting the restoring Clause in the 1st of *Edw.* the 6th already cited, by Reason whereof, saith the Act, "*Many Persons committing Robbery or Burglary in one County and flying into another and there taken with the Manner and convicted of Larceny, had been admitted to their Clergy, to the great Emboldening and Comforting of SUCH OFFENDERS,*" therefore, *for Redress thereof*, it is enacted that the Statute of the 25. of *H.* the 8th "*touching the putting SUCH OFFENDERS from their Clergy, and every Article, Clause, or Sentence contained in the same concerning Clergy, shall TOUCHING SUCH OFFENCES stand, remain, and be in full Strength and Virtue, as it did before the making the said Statute of the 1st Year of the King.*"

THE Point laboured by *Coke* in *Powlter's Case* is, that this Statute revived the *whole* Act of the 25th of *Hen.* the 8th. And consequently, that wilful Burning being named in the 1st Clause among the Offences enumerated in the Act of the 23^d is ousted, by the general Words *every Article, Clause, or Sentence contained in the same, concerning Clergy.*

OTHERS, and among them Lord *Hale*, have been of Opinion that general as the Words may seem to be, they must in the Construction of the Statute, be restrained to that particular Mischief, which from the Preamble appeareth to have been singly in the Contemplation of the Legislature, and for *Redress whereof* the Act was *professedly* made.

THEY have likewise concluded from the strict Penning of the enacting Clause itself that it extendeth only to *such Offenders, and such Offences* as are made the special Objects
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of it and for that Purpose are named in the Preamble, that is to Persons committing Robbery or Burglary in one County and flying into another, and there convicted of Larceny.

THE Statute of the 1st *Edw.* 6. did not, as I before observed, extend to Accessaries before the Fact, who frequently in a just Estimate of Things are more criminal than the Principals. To supply this great Defect the 4th and 5th of *Ph.* and *Mary* ousteth these Accessaries in Murder and the 4. 5. *Ph.* and other Offences enumerated in the 1st of *Edw.* the 6th and *M. c.* 4. some others, and in the Enumeration of particulars nameth the Offence of *Wilful Burning of Houses.*

THE Operation of this Act, and what Influence it had on *Powtler's Case* will be presently considered.

LORD *Hale* in the Passage I last cited from him saith that the 23^d *H.* 8. never was revived with regard to the Offence of wilful Burning. This Observation suggesteth the great Absurdity of supposing the 25th *H.* 8. to have been revived *in toto* without reviving the 23^d. For both the Acts, as far as concerneth this Point, are to be considered as forming one entire System of *Police* with regard to the Offences which are made the Objects of them. The Former extendeth to the Cases which ordinarily occur, *Convictions by Verdict or Confession.* The latter to such as very seldom happen, and are omitted in the former through meer Over-sight, the *Cases of standing Mute &c.* This being the State of the Case, it is extremely difficult to conceive that the Legislature should seriously intend to revive the one *in toto* without reviving the other; that they should think of reviving a whole Act, Part of which is merely auxiliary to a former, without reviving that for the effectuating of which the other was made.

HALE having rejected the Notion of the Revival of the 25th *H.* 8. *in toto* addeth, "Therefore the last, and I think the surest Answer to the Difficulty is, that the Statute of the 3^d and 4th *Ph.* and *M.* taking away Clergy in all Cases from him that maliciously commandeth, hireth, or counselleth the wilful Burning, doth by necessary Consequence take away Clergy in all Cases from the Principal Offender." (4th and 5th.)

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THIS is the Bottom upon which he, upon full Consideration of the Point, thinketh it may be safely rested. And, in truth, upon this Bottom, and former Precedents, which were carefully consulted, I think it was rested in *Powlter's Case*. For though Lord *Coke* in his Report of that Case strongly laboureth the Point of the Revival of the 25th H. 8. *in toto*, and saith *the Court so resolved*: yet it is very plain from his own Report of the Case, that others of the Judges, *how Many or Who he doth not say*, did not concur with him in that Opinion. But when he mentioneth the Statute of *Pb. and M.*, as one Ground of the Resolution, he saith, “ This was taken by Divers of the Justices,” *by Whom or how Many he doth not say*, to be a good Interpretation by the whole Parliament of all the said Acts concerning this Matter. For if the Principal should have his Clergy, it would be absurd, and what was never seen in our Law, that Clergy should be taken from the Accessary before. And Secondly, it would be in vain to take away Clergy from the Accessary, and leave the Principal to have his Clergy. For if the Principal hath his Clergy before Judgment, the Accessary shall not be arraigned.”

11. Co. 35. a.

THIS Reasoning he saith had it's Weight with Divers of the Judges: most probably it was, together with the constant Practice in like Cases, the Principal Ground of the Resolution in that Case. For if the Case of a Person pleading to the Indictment was not within the 25th H. 8. but stood purely on the 23^d, as undoubtedly it did, then the bare Revival of the Statute of the 25th, supposing it to have been revived *in toto*, could not have affected the Case of *Powlter*; for he pleaded *Not Guilty*, and was convicted by *Verdict*.

11. Co. 29. a.

LORD *Coke* admitteth that the 23^d H. 8. is not revived by the 5 and 6. E. 6. *Hale*, as I before observed, saith the same: but *Coke*, still presuming that the 25th is revived *in toto*, supposeth that the Case of a Conviction by *Verdict or Confession* is within the Letter of that Act. The

11. Co. 30. b.

Words, *as he citeth them*, are, “ He” [the Person Standing Mute, &c.] “ shall lose the Benefit of Clergy, in like manner as if he had directly pleaded *ETC.*, and thereupon had been found guilty, according to the Laws of the
“ Land.”

“Land.” From this Clause *so cited* he concludeth that every Person convicted by Verdict or *Confession* of any of the Crimes mentioned in the Act, is ousted of Clergy without recurring to the Act of the 23^d.

A little more Caution in this Citation would have overturned one Branch of his Lordship’s Conclusion, I mean with regard to a Conviction upon a *Confession*. For the *Ec.* here thrown in covereth some very material Words which the learned Reporter in Justice to the Argument should not have sunk. The Words of the Act are, “ Shall lose the Benefit of Clergy in like manner as if he had directly pleaded NOT GUILTY, and thereupon had been found Guilty, according to the Laws of the Land.” Is here a single Word that reacheth the Case of a Confession? or can the Clause by Construction be made to reach it? quite the contrary. The learned Judge himself in the Page next before admitteth, that had the 23^d H. 8. been so worded *the Case of a Confession could not have been brought within that Act*. By what Rule of Construction therefore is it brought within this?

30. a.

AND with regard to the true Scope and Intention of the Statute, surely it was not the Intent of it *Actum agere*; it was not to provide for the Cases of Conviction by Verdict or Confession, which the 23^d H. 8. then in full force, had effectually provided for. The plain Intent was to provide for Cases *not before provided for*, the cases of standing mute, &c. and none other; as any one may see who will consider the nature of the Act, and read it with due Attention.

I was willing to enter somewhat largely into the Point of the Revival of the 25th H. 8. though perhaps it hath led me a little too far from the Subject I have been pursuing: because a great Deal of the Confusion and Obscurity which hath been thrown over the Law touching Clergy, as it stood upon the Acts of H. 8. and Edw. 6. hath arisen from considering the Act of the 25th, and sometimes even the 23^d H. 8. as revived; and from blending them with the Statutes of Edw. 6. as Parts of one System of Law touching the Allowance or Non-allowance of Clergy.

IN my Opinion both the Acts were superseded, as far as concerned the Allowance or Non-allowance of Clergy, by the

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the restoring Clause in the 1st *Edw.* 6. already cited. 'Till the 5th and 6th *Edw.* 6. in Part, and for the Purpose before mentioned, revived that of the 25th, and the Statute of *Phil.* and *Mary* put the Matter out of Doubt with regard to *Arson*.

THE Judgment in *Powtler's* Case was founded in sound Sense, and upon legal Principles, though not upon those the learned Reporter hath chosen to found it upon.

SECT. 9.

SECT. 9. FROM the rules here laid down with what hath been offered by way of Illustration of them, it appeareth that the Law considereth the Offences of Murder and Petit Treason as substantially the same Offence, differing only in Degree. The latter aggravated by the Allegiance, however low, which the Murderer owed to the Deceased. And in consequence of that Circumstance of Aggravation, and of that alone, the Judgment upon a Conviction is more grievous in one Case, than in the other. Though in common Practice no material Difference is made in the manner of the Execution, unless in some very special Cases.

Lib. Aff. 7.
Bro. Treason. 15.

I remember a Woman* for the Murder of her Husband under Circumstances of high and uncommon Aggravation literally *Burnt Alive*. And we are told that in a Case of Petit Treason the Prisoner was by Order of the Court drawn immediately after Sentence from *Westminster-hall* to *Tyburn* without the poor Comfort of an Hurdle, or any other thing to keep his Head and Body from the Ground. This Severity the Judgment to be Drawn formerly imported; though now *Drawn upon on Hurdle* is become Part of the Judgment in all Cases of Treason.

SECT. 10.

SECT. 10. THERE are, it must be admitted, some Instances in which the Law maketh a wide Difference between Petit Treason and Murder, with regard to the Trial and Method of Conviction. But that Difference is not founded in the different Nature of the Offences, but upon meer positive Institutions.

THE Statute of the 22. *H.* 8. c. 14. reduced the Peremptory Challenge in the Case of Petit Treason to 20. The

28.

* *Catharine Hayes*. Convicted at the *Old Bayly* in April 1726.

28. *Edw.* 3. c. 13. which extended to Petit Treason, introduced the Trial *per Medietatem Linguae*. Both these Statutes were virtually repealed by the 1. and 2. *Ph.* and *M.* c. 10. which provideth that *in all Cases of Treason* the Trial shall be according to the Course and Order of the Common-Law. This restored the peremptory Challenge of 35.

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THE 1. *Edw.* 6. c. 12. expressly requireth two Witnesses upon the Indictment and at the Trial, as well in the Case of Petit as High Treason; and the 5. and 6. *Edw.* 6. c. 11. by general Words extending to all Treasons, requireth that the Witnesses, *if living*, shall be examined in Person upon the Trial in open Court. These Statutes are still in Force. And although some Improvements have been made by the Statute of King *William*, yet as that Statute extendeth only to the several Species of High Treason therein provided for, the Case of Petit Treason standeth solely on those of *Edw.* 6.

UPON the Foot of the 5. and 6. *Edw.* 6. Depositions of Witnesses taken by the Coroner, or Informations taken before Justices of the Peace, and certified to the Goal Delivery pursuant to the Statute, are not Evidence *where- 1. 2. Ph. and on to ground a Conviction for Petit Treason, if the Party M. c. 13. be living*, though unable to travel or kept out of the Way 1. Hale 305. by the Prisoner or by his Procurement. 2. Hale 284.

THESE I conceive are the only Instances wherein the Law maketh a Difference between the Cases of Petit Treason and Murder. And this Difference is plainly Matter of positive Institution, and doth not arise out of the different Nature of the Offences.

END OF THE DISCOURSE
ON HOMICIDE.

DISCOURSE III.

OF

ACCOMPLICES

IN HIGH TREASON

AND

OTHER CAPITAL OFFENCES.

COURSE III

ACCOMPLICES

NIGHT TRIAL

AND

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DISCOURSE III.

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Of ACCOMPLICES in HIGH TREASON and other CAPITAL OFFENCES.

CHAP. I.

*Of Accomplices in Treason, and of Persons present
aiding and abetting in Felony.*

UNDER this Head something will be said briefly touching the Connection which in Judgment of Law subsisteth between Principals and Accessaries in Felony, and the Relation they stand in to each other.

BUT I have in the Title of this Discourse chosen to make use of the Term *Accomplices*. Because it taketh in all the *Participes Criminis*, as well in High Treason as Felony. And in the Latter, whether they are considered in strict legal Propriety as Principals in the first or second Degree, or meerly as Accessaries before or after the Fact.

SECT. I. It is well known that in the Language of the Law there are no Accessaries in High Treason, all are Principals. Every Instance of Incitement, Aid or Protection, which in the Case of Felony will render a Man an Accessary before or after the Fact, in the Case of High Treason whether it be Treason at Common-Law or by Statute, will make him a Principal in Treason; unless the Case be otherwise provided for by the Statute creating the Offence, or where the special Penning of the Act leadeth to a different Construction. SECT. I.
See to this Purpose

THIS Rule hath long obtained, and will not now be controverted. But I think it a Matter of great Importance that the Rule be rightly understood, I mean with those Limitations which sound Sense and common Equity require. For Cases have frequently happened, where an Offender in the final Issue of the Prosecution may be considered as a Principal in Treason; and yet during the intermediate

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diate Steps towards his Conviction, he ought from a Principle of natural Justice to be considered meerly *as in the Nature* of an Accessary before or after the Fact.

FOR Instance, *A.* adviseth *B.* to counterfeit the King's Coin or Seals, or indeed to commit any of the Offences declared Treason by the 25. *Edw.* 3. and furnisheth him with Means for that Purpose; (that Species of Treason which in Judgment of Law falleth within the Clause of Compassing the Death of the King, Queen, or Prince always excepted.) If *B.* in consequence of this Advice and Encouragement doth the Fact, *A.* is a Principal in the Treason. For such Advice and Assistance in the Case of Felony would have made him an Accessary before the Fact; and in High Treason there are no Accessaries, all are Principals. But if *B.* forbeareth to commit the Fact to which he is incited, *A.* cannot be a Traitor meerly on account of this Advice and Encouragement, though his Behaviour hath been highly criminal. For bare Advice or Incitement, how wicked soever, unless in the Cases already excepted, will not bring a Man within the Statute, where no Treason hath been committed in consequence of it.

So in the Case of Assistance or Protection supposed to be given to a Traitor after the Fact, the Party knowingly affording such Protection, *if the Treason hath been in Fact committed*, will be a Principal in Treason for the Reasons already mentioned. But if a Person lying probably under a Suspicion of Guilt, conscious of his own Innocence should think it adviseable to withdraw and patiently to wait the Issue of Things when the Storm which gathereth round him shall be blown over; the Party who received and harboured him during his Retreat cannot be a Traitor for so doing; provided the Conduct of his Friend shall appear upon Examination to have been blameless.

3 Inst. 9.
138.

LORD Chief Justice *Coke*, who while he was in the Service of the Crown seemeth to have had no Bowels in State-Prosecutions, when he layeth down and applieth the Rule I have mentioned, *that all are Principals in Treason*, plainly goeth upon a Supposition that the Treason presumed to have been procured *was afterwards in Fact committed*; or that the Party supposed to have been knowingly received and harboured had been actually guilty of High Treason.

Treason. It would have been absurd to the last Degree to have gone upon any other Supposition. For it cannot be said with any Sort of Propriety that a Person procured an Offence to be committed which in Truth never was committed; or that any Person knowingly, viz. *with a full Knowledge of a Treason to have been committed*, (that I take to be the legal Sense of the Term *knowingly*;) received and harboured the Traitor, if such Treason never had been committed by him.

THERE needeth very little to evince the Truth of this Observation more than to give a proper Attention to the Rule already mentioned, *that every Act which in the Case of Felony will render a Man an Accessary will in the Case of Treason make him a Principal*. Especially if we add to it, according to Lord Hale, *that nothing short of such an Act will*. What Circumstance therefore is necessary to render a Man an Accessary in Felony? plainly this above all others, *that the Felony charged upon the Principal hath been in Fact committed by him*. For which Reason no Verdict can pass against the Accessary 'till the Truth of this single Fact shall have been legally established; either by the Conviction of the Principal if he continueth amenable to Justice; or by Judgment of Outlawry if he abscondeth or flyeth. Unless the Accessary chooseth to waive the Benefit of the Law, and to submit to a Trial.

THIS Rule is founded in good Sense and natural Justice. The Accessary is indeed a Felon, but guilty of a Felony of a different Kind from that of the Principal. It is, if I may use the Expression, a derivative Felony connected with and arising out of that of the Principal and cannot exist without it.

WHETHER the same equitable Rule is by Parity of Reason to be extended to treasonable Actions of a similar Nature, I mean to such as are of the derivative Kind, and though in the Language of the Law stiled principal Treasons, yet partaking of the Nature of meer *accessorial* Offences, cometh now to be considered. This is the Point of Importance I hinted at in the Outset of this Discourse. For if in Prosecutions for Treasons of this Kind the same Rule of Equity be observed as in Cases of Felony, it will become a Matter of very small Importance to have been learning

C H A P. I. by what special technical Expression we are to describe the Offence.

1. Vol. Chap. 22. f. 233. ---239. LORD Chief Justice *Hale* spendeth a whole Chapter on this Point, which he intitleth, "Concerning Principals and *Accessaries* in High Treason." And though in Conformity to the established Mode of speaking, he calleth every Person who can any ways be considered as an Accomplice in Treason a *Principal* in it; yet when he cometh to speak of the Course and Order to be observed in the Prosecution of the Offenders, he considereth those *Accomplices* whose supposed Guilt is connected with and dependeth upon the real Guilt of another in the Light of meer *Accessaries*; and stateth a few Cases by way of Illustration and Proof.

A Person is committed to Prison for High Treason, the Goaler voluntarily suffereth him to escape; or a Stranger *knowing* of such Commitment breaketh the Prison and setteth him at large; or knowingly rescueth him after an Arrest and before he is brought to Prison. In all these Cases the Goaler and the Person breaking Prison or rescuing, whom he in a Passage I shall presently cite calleth a *Kind of Accessaries*, are Principals in Treason, if the Party imprisoned were really a Traitor. If he was not so, it will be no Treason in them. And therefore they shall not be arraigned 'till the principal Offender be convicted. For if he be acquitted of the principal Offence the others shall be discharged.

Cro. Car. 583. Jones (W.) 455. I have used the Words *knowing* and *knowingly*, because I think that Circumstance is a necessary Ingredient in the Case. It is true it was resolved in *Benstead's* Case cited here by the learned Author and at p. 141, *but I think not with entire Approbation of the Rule*, that the Party breaking Prison would have been guilty of Treason *though he had NOT known that Traitors were there*. I am by no Means satisfied with this Opinion. For the single Authority upon which this Point is said by *Hale* to have been so ruled doth by no Means warrant it. The Book expressly stateth it, *that the Party did know that Traitors were there*. And *Brooke* who abridgeth the Case is expresse to the same Purpose, 2. Inft. 590. "*Sciant que Traitors fueront en ceo.*" And *Coke* citing the same Case layeth a great Stress on this Circumstance, *that the Party knew that Traitors were there*, and conducted them out of Prison.

I have

I have upon another Occasion taken some notice of this short and imperfect report of *Benstead's Case*, and observed that the Prosecution against him appeareth to have been carried on with uncommon Expedition, not to say with some Degree of Precipitancy. And probably the forcing of Prison Doors, *as many were forced during the Tumult*, was given in Evidence on his Trial among other Outrages of the Night, as Overt-Acts of levying War; the Species of Treason for which he stood indicted.

THE same Rule of Equity and natural Justice the learned Judge in another Place applieth to the Case of felonious Escapes and Rescues, and addeth, "If the Principal Offender be convicted and hath his Clergy, I think the Goaler or Rescuer shall never be put to answer the Escape or Rescue. *As the Accessary where the Principal hath his Clergy is thereby discharged.** For the Rescuer and Officer are a Kind of *Accessaries*."

HE calleth them a Kind of *Accessaries*, because there can be no felonious Escape or Rescue where no Felony had been previously committed. But in strict legal Propriety they are not Accessaries to the original Felony. For though a Man should be committed for many Felonies, yet the Escape or Rescue is considered as one single Felony and is so charged.

WITH REGARD to a Person knowingly receiving and harbouring a Traitor, the learned Judge in the Place lately cited argueth, That though he is in the Eye of the Law a principal Traitor and shall not be said to be an Accessary, yet thus much he partaketh of an Accessary, his Indictment must be Special of the Receipt and not of the Principal Treason. If he is Indicted by a several Indictment, he shall not be Tried 'till the Principal be convicted. If in the same Indictment with the Principal, the Jury must be charged to inquire first of the principal Offender, and if they find him guilty, then of the Receipt; and if the Principal

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Disc. 1. Ch.

2. S. 5.

1. Hale 598.

1. Hale 599.

1. Vol.

Chap. 22.

* The 1st of *Q. Anne* hath provided for this Case and for the Case of a Pardon of the Principal after Conviction. But in the Treasons of the accessorial Kind already mentioned, and which will be mentioned, I do not conceive that any Rule of Equity or natural Justice would be infringed by giving the Rule "That in Treason there are no Accessaries, all are Principals," it's utmost Extent against every Accomplice; though the principal Offender should be pardoned or die after Conviction and before Attainder. I shall enlarge a little as to this Point in the Case of Accessaries in Felony in it's proper Place.

Sess. 2. c. 9.

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4. St. Tri.
130.

Principal be not guilty, then to acquit both. For thought in the Eye of the Law they are both Principals in Treason —yet in Truth he (the Receiver) is so far an Accessary that he cannot be guilty if the Principal be innocent.

IN the Case of Mrs. *Lisle* whose hard Fate it was to fall into the Hands of perhaps the worst Judge that ever disgraced *Westminster-Hall*, no Regard was paid to this Doctrine. I would not be thought to mention this Case as an Authority upon which a Doubt can at this Day be possibly raised. I do it for the Sake of what happened afterwards, which I take to be an Authority with me. Her Attainder was afterwards reversed in Parliament: and the Act reciteth among other Hardships of her Case, “ that she was
“ by an irregular and undue Prosecution indicted for en-
“ tertaining and concealing *John Hicks* a false Traitor
“ knowing him to be such; *though the said Hicks was not*
“ *at the Time of the Trial attainted or convicted of any such*
“ *Crime.*”

1. Hale 613.
2. Hale 223.

THE same learned Author in other Parts of his Work argueth to the Purpose for which I have already cited him; and applieth the same Rule of Equity to the Case of a Person indicted for contriving, abetting, aiding, or consenting to Treason which happeneth never to have been carried into Execution.

BUT here we must distinguish, though the learned Judge speaking in general Terms apposite to his present Purpose doth not. For with regard to every Instance of Incitement, Consent, Approbation, or previous Abetment in that Species of Treason which falleth under the Branch of the Statute touching the Compassing the Death of the King, Queen, or Prince, every such Treason is in it's own Nature, independently of all other Circumstances or Events, a compleat Overt-Act of Compassing; though the Fact originally in Contemplation of the Parties should never be effected or so much as attempted. *A.* inciteth *B.* to a Treason of this Kind, *B.* in Abhorrence of the Crime, and from a just Sense of the Duty every Man oweth to his King and Country, and which every good Man in the like Circumstance will pay, maketh a Discovery; by Means whereof *A.* is brought to Justice. This Incitement on the Part of *A.* is a compleat Overt-Act of Treason within this Branch

of

of the Statute, and hath no Sort of Connection with or necessary Dependence upon the future Behaviour of B. And therefore whatever the learned Author hath advanced in general Terms touching fruitless ineffectual Advice or Incitement to treasonable Practices, must be understood of such Treasons only as do not fall within this Branch of the Statute.

SECT. 2. I come now to consider the Case of Accomplices in Felony. SECT. 2.

WHERE two or more are to be brought to Justice for one and the same Felony, they are considered in the Light either of Principals in the first Degree, as having actually and with their own Hands committed the Fact; or of Principals in the second Degree, as having been present aiding and abetting at the Commission of it; or of Accessories before or after the Fact.

THE Distinction between Principals in the first and second Degrees, or to speak more properly, the Course and Order of proceeding against Offenders founded on that Distinction, seemeth to have been unknown to the most antient Writers on our Law; who considered the Persons present aiding and abetting in no other Light than as Accessories AT the Fact, and consequently not liable to be brought to Trial 'till the principal Offenders should be convicted or outlawed.

THIS seemeth to be agreed by the best of our modern Writers; and therefore I will not spend Time in transcribing many Authorities from the Antients. One or two I will briefly cite and refer to others.

BRACTON * speaking of the Course of Proceeding where the principal Offender is not amenable to Justice saith, "*Appellati vero de Forcia salvo attachientur quousque appellati de Facto convincantur.*" But where all are amenable, † "*Procedatur contra omnes per Ordinem: dum tamen illi de Forciâ non respondeant antequam Factum convincatur.*"

FLETA speaketh to the same Purpose and almost in Lib. 1. c. 31. Bracton's Words. And the Mirror in enumerating the se- S. 8.

verbal
* *De Coron. c. 8. S. 3. and c. 12. S. 9. to the End of the Chapter.*

† Ch. 19. S. 4. 5. and to the same Purpose see 4. E. 1. St. 2. *de Officio Coronatoris.*

C H A P. veral Sorts of Accessaries, among others, mentioneth;

1. " *Ceux que sont en la Force.*"

c. 1. S. 13.

I have here taken it for granted that by the *Appellati de Forciâ* these Authors meant Persons present aiding and abetting. The Appeal *de Forciâ* proveth this beyond the Possibility of a Contradiction. " *A. appellat B. de Forciâ*

Braet. de
Coron. c. 19.
S. 5.

" *quod idem B. venit cum prædicto C. (the Perpetrator) & tenuit ipsum D. (the Deceased) quamdiu ipse C. illum interfecit.*" In the Case of Rape the Appeal *de Forciâ* is to the same Purpose,* *mutatis mutandis*; plainly importing that the Defendant was present aiding and abetting at the Fact.

c. 14.

I am aware of the Sense *Coke* putteth upon the Words Commandment, *Force*, Aid, or Receipt, in his Comment on the Statute of *Wesim.* 1. *That none of them import more than the Offence of Accessaries before or after the Fact.* And I admit that they must now be so understood, though the original Import of the Word *Force* in the Act was confined to those we now call Principals in the second Degree. But the great Inconvenience of the Rule I have mentioned touching the Course and Order of Proceeding against Accomplices in Felony, tending as it plainly did to the total Obstruction of Justice in many Cases and to great Delays in others, induced the Judges from a Principal of true political Justice to come into the Rule now settled, *That all Persons present aiding and abetting are Principals.*

See Stanf.
41. A.

See 40. Edw.
3. 42. a
Lib. Ass. 240.
b. 245. a.
See Plowd.
97.

THIS Rule was not thoroughly established 'till after the Time of *Edward* the Third. And so late as the First of *Queen Mary* a Chief Justice of *England* greatly doubted of it. Though indeed it had been sufficiently established and the Distinction between Principals in the first and second Degrees was well known long before that Time.

NOTHING needeth to be said by way of Explanation touching Principals in the first Degree. What Acts of Concurrence are necessary to render a Person a Principal in the second Degree, *viz.* as an Aider and Abetter, is now to be considered.

* *Braet de Coron.* ch. 28. S. 4. 5. And to the same Purpose see c. 21. S. 8. the Defendant's Oath upon joining Battle in an Appeal.

S E C T. 3. HE must be present at the Perpetration, otherwise he can be no more than an Accessary before the Fact; except in some special Cases founded in Necessity and political Justice, I mean that Justice which is due to the Publick, *Ne Maleficia remaneant impunita*.

A. with Intention to destroy *B.* layeth Poison properly disguised in his Way, *B.* taketh it and dieth. *A.* though absent when the Poison was taken is a Principal. And if this had been done at the Instigation of *C.* he if absent would have been no more than an Accessary in the Murder; unless they had both mingled the Poison and laid it in the Way of *B.* For in that Case both of them would have been Principals, each of them having gone as far as the other towards Perpetration. Keil. 52. 53.

If *A.* had prepared the Poison and delivered it to *D.* to be administered to *B.* as a Medicine, and *D.* accordingly in the Absence of *A.* had administered it *not knowing that it was Poison*, and *B.* had died of it, *A.* would have been a Principal in the Murder, upon the same Foot of Necessity. For *D.* being innocent *A.* must have gone wholly unpunished if he could not have been considered as a Principal. But if *D.* had known of the Poison as well as *A.* did, he would have been a Principal in the Murder, and *A.* if absent an Accessary before the Fact. For the Rule of Necessity already mentioned doth not here take Place.

THE Law is the same in the Case of inciting a Madman or a Child not at Years of Discretion to commit Murder or other Felony in the Absence of the Person inciting. And therefore in the Case of *Anne Course* reported before, who was indicted as an Accessary before the Fact, it was very properly stated by the learned Judge before whom she was convicted, that the Daughter who committed the Fact at the Instigation of the Mother was of the *Age of 14, and of sufficient Discretion*. For had the Mother employed, as she threatened she would, the least of her Children, *she* must have been indicted as the Principal, since the Child not being of Years of Discretion was innocent.

S E C T. 4. WHEN the Law requireth the Presence of the Accomplice at the Perpetration of the Fact in order to render S E C T. 4.

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render him a Principal, it doth not require a strict actual immediate Presence, such a Presence as would make him an Eye or Ear-Witness of what passeth.

SEVERAL Persons set out together, or in small Parties upon one common Design, be it Murder or other Felony, or for any other Purpose unlawful in itself, and each taketh the Part assigned him: Some to commit the Fact, others to watch at proper Distances and Stations to prevent a Surprise, or to favour if Need be, the Escape of those who are more immediately engaged. They are all, provided the Fact be committed, in the Eye of the Law present at it. For it was made a common Cause with them, each Man operated in his Station at one and the same Instant towards the same common End; and the Part each Man took tended to give Countenance, Encouragement, and Protection to the whole Gang, and to insure the Success of their common Enterprize.

I will not here multiply Cases upon the Head of constructive Presence. This may be sufficient by way of Illustration. Others founded in the same Principle of mutual Concert, Aid, and Protection will fall in in their proper Places.

SECT. 5.

SECT. 5. IN order to render a Person an Accomplice and a Principal in Felony, he must be aiding and abetting at the Fact, or ready to afford assistance if necessary. And therefore if *A.* happeneth to be present at a Murder for Instance, and taketh no Part in it, nor endeavoureth to prevent it, nor apprehendeth the Murderer, nor levyeth Hue and Cry after him, this strange Behaviour of his though highly criminal, will not of itself render him either Principal or Accessary.

Dalt. 395.
Stanf. 40. F.

I would be here understood to speak of that Kind of Homicide amounting in *Construction of Law* to Murder, which is usually committed openly and before Witnesses. For in the Case of Assassinations done in private, to which Witnesses who are not Partakers in the Guilt are very rarely admitted, the Circumstances I have mentioned may be made use of against *A.* as Evidence of Consent and Concurrence on his Part; and in that Light should be left to the Jury, if he be put upon his Trial.

SECT.

SECT. 6. BUT if a Fact amounting to Murder should be committed in Prosecution of some unlawful Purpose, *though it were but a bare Trespass*, to which *A.* in the Case last stated had consented, and he had gone in order to give Assistance, if Need were, for carrying it into Execution, this would have amounted to Murder in him, and in every Person present and joining with him. *Keil. 116.* The Law would be just the same though the Party slain had been an utter Stranger and had taken no Part on either Side, but had come with a friendly Intention towards both, and to accommodate Matters between them.

It is true here might be no special Malice against the Party slain, nor deliberate Intention to hurt *him*; but if the Fact was committed in Prosecution of the original Purpose *which was unlawful*, the whole Party will be involved in the Guilt of him who gave the Blow. For in Combinations of this Kind the mortal Stroke though given by one of the Party is considered in the Eye of the Law and of sound Reason too, as given by every Individual present and abetting. The Person actually giving the Stroke is no more than the Hand or Instrument by which the others strike.

AND therefore where the Indictment chargeth, that *A.* *1. Hale 437.* gave the mortal Stroke, and that *B.* and *C.* were present *463.* aiding and abetting; if it cometh out in Evidence that *B.* *2. Hale 344.* was the Person who gave the Stroke, and that *A.* and *C.* *345.* were present aiding and abetting, they may be all found guilty of Murder or Manslaughter at Common-Law, as Circumstances may vary the Case. The Identity of the Person supposed to have given the Stroke is but a Circumstance and in this Case a very immaterial one, the Stroke of one is in Consideration of Law the Stroke of all. But in a Prosecution on the Statute of Stabbing it is otherwise for a Reason I have already given.

SECT. 7. I have by way of Caution supposed that the Murder was committed *in Prosecution of some unlawful Purpose*, some common Design in which the combining Parties were united, and for the effecting whereof they had assembled. For unless this shall appear though the Person

CHAP. I. Person giving the mortal Blow may himself be guilty of Murder, (he may possibly have conceived Malice against the Deceased and taken the Opportunity which the Confusion of a Croud or Darkeness of the Night afford to execute his private Revenge,) he, I say, may be guilty of Murder, or if it were upon a sudden Quarrel, of Manslaughter; and yet the others who came together for a different Purpose will not be involved in his Guilt. And therefore in *Plummer's Case* this Circumstance not being found by the special Verdict, nor any other Fact found from which the Court could with Certainty draw the Conclusion that the Gun was discharged in Prosecution of the Design in which the Gang was united, *Plummer* was discharged.

Keil. 111.

In that Case the Verdict stated, that *Plummer* and his Accomplices were assembled in order to transport Wool of the Growth of *England* to *France* contrary to the Statute. That an Officer of the Crown duly authorized for that Purpose met and opposed them. That during the Scuffle which ensued a Gun was discharged by one of the Offenders, and *John Harding* one of the same Gang was killed. The Question was, whether *Plummer* and the rest of his Party were guilty of this Murder.

It was agreed by the Court, 1st, that had the King's Officer or any of his Assistants been killed by the Shot, it would have been Murder in all the Gang. 2^d. That had it appeared that the Shot was levelled at the Officer or any of his Assistants, this likewise would have amounted to Murder in the whole Gang, though an Accomplice of their own happened to be killed. For the Malice *Egreditur Personam*. But this Fact not having been certainly found, the Prisoner was discharged.

I take it that the Point on which the Case turned was this, it did not appear from any of the Facts found that the Gun was discharged in Prosecution of the Purpose for which the Party was assembled. But had it been positively found that it was discharged against the Officer or his Assistants, the Court upon this finding might without in-croaching on the Province of the Jury have presumed that it was discharged in Prosecution of their original Purpose. In Cases so circumstanced, *Res ipsa loquitur*.

A. beat.

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CHAP.

I.

MS. Tracy.

A. beat a Constable in the Execution of his Office, but Company interposing they were parted and he desisted. *B.* a Friend of *A.* rushed suddenly in and took up the Quarrel, and fell upon the Constable who in the Struggle was killed, *A.* having not being at all engaged after they were parted. It was held by *Holt* and *Rokeby* at *Hartford* Assizes Murder in *B.*, but that *A.* was innocent. For it did not appear that *A.* and *B.* had previously agreed upon offering any Violence to the Constable, or to obstruct him in the Execution of his Office. The Murder was not committed in Consequence of any unlawful Combination between them.

THREE Soldiers * went together to rob an Orchard, two got upon a Pear-Tree and the third stood at the Gate with a drawn Sword in his Hand. The Owner's Son coming by, collared the Man at the Gate and asked him what Business he had there, and thereupon the Soldier stabbed him. It was ruled by *Holt* to be Murder in him, but that those on the Tree were innocent. They came to commit a small inconsiderable Trespass, and the Man was killed upon a sudden Affray without their Knowledge. "It would, said he, have been otherwise if they had all come thither *with a general Resolution against all Opposers.*"

THIS Circumstance I think would have shewn that the Murder was committed in Prosecution of their original Purpose. But that not appearing to have been the Case, those on the Tree were to be considered as meer Trespassers. Their Offence could not be connected with that of him who committed the Murder.

SECT. 8. A general Resolution against all Opposers, whether such Resolution appeareth upon Evidence to have been actually and explicitly entered into by the Confederates, or may be reasonably collected from their Number, Arms, or Behaviour at or before the Scene of Action, such Resolutions so proved have always been considered as strong Ingredients in Cases of this Kind. And in Cases of Homicide committed in consequence of them, every Person pre-

* *Sarum*, Lent Assizes 1697. MSS. *Denton* and *Chapple*.
Z sent

C H A P.
I.

sent in the Sense of the Law when the Homicide hath been committed, hath been involved in the Guilt of him that gave the mortal Blow.

THE Cases of Lord *Dacres* * mentioned by *Hale*, and of *Pudsey* reported by *Crompton* and cited by *Hale*, turned upon this Point. The Offences they respectively stood charged with as Principles were committed far out of their Sight and Hearing; and yet both were held to be present. It was sufficient that at the Instant the Facts were committed they were of the same Party and upon the same Pursuit, and under the same Engagement and Expectation of mutual Defence and Support with those that did the Facts.

BUT *A. B.* and *C.* ride out together with Intention to rob on the Highway. *C.* taketh an Opportunity to quit the Company, turneth into another Road, and never joineth *A.* and *B.* afterwards. They upon the same Day commit a Robbery. *C.* will not be considered as an Accomplice in this Fact. Possibly he repented of the Engagement, at least he did not pursue it. Nor was there at the Time the Fact was committed any Engagement or reasonable Expectation of mutual Defence and Support so far as to affect him.

SECT. 9.

SECT. 9. WITH REGARD to Assemblies of this Kind where the whole Party may be involved in the Guilt of one or more, I have already supposed that such Assemblies were formed for carrying some common Purpose *unlawful in itself* into Execution. For if the original Intention was lawful and prosecuted by lawful Means and Opposition is made by others, and one of the opposing Party is killed in the Struggle; in that Case the Person actually killing may be guilty of Murder or Manslaughter as Circumstances may vary the Case. But the Persons engaged with him will not be involved in his Guilt, *unless they actually aided or abetted him in the Fact*. For they assembled for another Purpose, *which was lawful*, and consequently the Guilt of the Person actually killing cannot by any Fic-

* 1. *Hale* 439. *Crom.* 34. a. b. 1. *Hale* 534. See 1. *And.* 116. the Case differently reported.

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tion of Law be carried against them beyond their original Intention. CHAP.

I.

1. Hale 444.

SECT. 10. I will now proceed to another Point falling naturally under this Head touching Aiders and Abettors present at the Fact. SECT. 104.

It is admitted and cannot be denied that these Persons are to some Purposes considered as Principals in the Felony, but Principals in the second Degree. Whether to all Purposes and in all Cases they are so considered deserveth some further Enquiry.

FOR with regard to new Felonies created by Statutes which take away Clergy from those who shall be guilty in such Manner and under such Circumstances as are therein particularly set forth, without expresse mention of Aiders and Abettors or any Words which manifestly extend to them, whether meer Aiders and Abettors shall likewise in the Construction of such Statutes be ousted, is a Point which I conceive deserveth great Consideration. And the Question I conceive will turn, not barely upon any general Rules of Law touching Aiders and Abettors, but upon the special penning of the several Statutes, and the Rules of Law which enter into the Construction of them.

CASES without Number may be cited to shew in general, how extremely tender the Judges have been in the Construction of Statutes which take away Clergy; sometimes even to a Degree of Scrupulosity excusable only in Favour of Life.

I will confine myself to a Few which I take to be more apposite to the present Question in order to shew, how with regard to the Allowance or Non-Allowance of Clergy, they have carefully distinguished between the Cases of Principals in the first and second Degrees, the actual Perpetrators and meer Aiders and Abettors.

IN the Case of the King against *Page* and *Harwood* upon the Statute of Stabbing, which enacteth that "If any Man shall stab or thrust"—these Defendants were present aiding and abetting a third Person not named by the Reporters, who in Fact did make the Thrust and was denied his Clergy. But the Defendants though agreed to have been Principals in Manslaughter at Common-Law were admitted

Allen 43.
Stiles 86.

C H A P. admitted to their Clergy. For, saith the Report, "though
I. " in Judgment of Law every one present and aiding is a
" Principal, yet in the Construction of this Statute
" which is so penal it shall be extended only to such
" as really and actually made the Thrust; not to those who
" in Construction of Law only may be said to make it."

THIS Case is cited with Approbation by *Hale* and by *Holt*, and was never yet denied to be Law.*

THE same Rule of Construction prevailed in the Case of *Evans* and *Finch* upon the Statute of the 39. *Eliz.* against Robbery in dwelling-Houses.† They both put up a Ladder against the Chamber-Window, *Evans* opened the Window, got into the Chamber and stole 40*l.* *Finch* stood on the Ladder in the View of *Evans*, saw him in the Chamber, assisted in the Robbery, and had a Share of the Booty, but *did not enter the Chamber*. And upon that Account *alone* he though plainly a Principal present and abetting had his Clergy, and *Evans* had Judgment of Death.

1. *Hale* 527. FOR saith *Hale* after citing this Case " it must be a
528. 537. " Stealing IN the House. And therefore he that steal-
" eth or is Party to the stealing being out of the House is
" not ousted of his Clergy.

THUS the Law stood with Regard to this Statute, and to 5. 6. *E. 6.* against an Offence of the like Kind, till by 3. 4. *W. M.* Aiders and Abettors were expressly ousted.

c. 9

c. 4.

THE same Rule of Construction did always govern and doth to this Day govern in the Case of Larceny *clam & secretè a Personâ*, upon the Statute of 8th of *Eliz.* The Person who actually picketh the Pocket is ousted, not he who is present aiding and abetting. Though without some Accomplice ready at Hand to take off the Booty, this Sort of Theft seldom succeedeth. For, saith *Hale*,
1. *Hale* 529. *this Statute shall be taken literally.*

I will now apply these Cases which I think have hitherto stood the Test and Criticism of all succeeding Times, to the present Question. *Page* and *Harwood* were undoubtedly Principals in the Manslaughter, the Thrust made by

* See 1. *Hale* 468. and other Places. And the Case of the Queen against *Whistler* reported *Salk.* 542. *Far.* 129. 2. Lord *Raym.* 842.

† *Cro. Car.* 473. cited likewise by *Holt* in *Whistler's* Case. him

him who was denied his Clergy, was in Construction of CHAP. I.

Law made by every Man present and abetting. *Finch* was likewise a Principal in the Robbery, the Entry of *Evans* was in Construction of Law the Entry of *Finch*. It is so held every Day in the Case of Burglary at Common-Law, where an actual Entry of some Kind or other is equally necessary. Why therefore did not a constructive Thrust in one Case and a constructive Entry in the other, operate so as to oust the Accomplices present and abetting of Clergy? The Reason is plain and hath been already hinted at, the Judges were upon the Construction of Statutes very penal, which were to be taken literally and strictly; Aiders and Abettors are not named or described, and therefore could not as they conceived, be brought within the Statutes.

SECT. II. THE Construction which hath been constantly put upon the Statutes ousting Clergy in Murder, Robbery, Rape, and Burglary hath been different. Aiders and Abettors present have been always ousted, and I admit they ought to be so.

THE same Construction hath been put upon the Statute against Buggery.

BUT these Cases widely differ from those I have cited. In those Aiders and Abettors are not once named; nor are they described by any Terms importing that the Legislature intended to oust them. In the others, the Legislature hath made use of Terms which at the Time of making the Acts and long before were well known to include them.

“No Person,” saith the Act of E. 6., “That hath been or shall be convicted of Murder of Malice premeditated—or of robbing any Person in or near the Highway—shall be henceforward admitted to Clergy.” 1. E. 6. c. 12.

“If, saith the Statute of Eliz., any Person shall fortune to commit any felonious Rape, Ravishment, or Burglary and to be found guilty—he shall suffer Death without Benefit of Clergy.” 18. Eliz. c. 7.

By these Statutes Clergy is taken away from the several Offences described by legal technical Terms of well-known Signification, Murder, Robbery, Rape and Burglary.

CHAP.

I.

THIS Observation may possibly be thought a little too nice and critical. But critical as it may appear to common Readers, it hath been countenanced by great Authority; * and hath always had great Weight in Questions touching the Allowance or Non-allowance of Clergy.

ONE Instance of this legal Nicety, if it must be so called, I will mention; the Reader's own Observation hath I doubt not furnished him with more. The Statutes which take away Clergy from Persons *convicted* of the Offences which are the Objects of them, are well known not to have extended to Persons outlawed, standing mute, challenging peremptorily above the legal Number, or not answering directly to the Charge. This great Defect, owing to meer Oversight or Inaccuracy of Expression, the Judges have never attempted to cure—But the Legislature hath by many subsequent Acts which need not be particularly cited, interposed and applied the proper Remedy.

AND if a Statute hath happened to use the Words *convicted by VERDICT*, the Case of a Confession hath likewise been considered as *Casus omiffus*. For Statutes taking away Clergy must, say all the Books, in the Construction of them be literally and strictly pursued. On the other Hand where the Statute taketh away Clergy from the OFFENCE *generally without other Circumstance*, it is taken away from the Offender under every Circumstance in which his Case may be considered.

BUT this Point will not rest here. For let me ask, who are declared to be the Objects of these Acts? Persons *convicted* of Murder, Robbery, Rape, or Burglary. And who at the Time these Statutes were made were liable to be convicted as Principals in those Offences, and were universally known to be so? undoubtedly Aiders and Abettors present. Consequently they fall within the Letter of the Acts and must be the Objects of them.

So with regard to Clergy in the Case of Buggery, it is taken from the Offence under a Term of certain well-known Import and *from all Persons offending therein*.

25. H. 8 c. 6.
Revived by
5. Eliz. 17.

“ Forasmuch as there is no sufficient condign Punishment
“ for the detestable Vice of Buggery with Mankind or Beast,

* See Lord Holt's Argument in *Whistler's Case* cited before as reported by Lord *Raymond* and *Farresly*.

“ be

“Be it enacted that the *same Offence* shall from hence-
 “forth be adjudged Felony. And that no Person offend-
 “ing in any such Offence, shall be admitted to his Cler-
 “gy.” These Words, *offending in such Offence*, are
 large enough to include the Case of every Person present
 and assisting at such a Scene of detestable Lewdness; and
 probably were chosen by the Legislature for that Pur-
 pose. As the Word *Person* was in Lord Coke’s Opinion, 3. Inst. 59.
 in order that both Sexes offending in that Offence might
 be included.

SECT. 12. I have already shewn that according to SECT. 12.
 our oldest Writers, Aiders and Abettors present were con-
 sidered not as Principals, but as Accessaries at the Fact.
 And have endeavoured to account for the Introduction of
 the Rule as it is now settled, that they are all Principals.

THE sole Motive to this Alteration seemeth to me to
 have been that Aiders and Abettors present might be
 brought to their Trials while the Fact was recent and
 most capable of Proof, though the actual immediate Per-
 petrators should not be then amefnable. And I am great-
 ly strengthened in this Opinion by what is disclosed in
 the Cases already cited to this Point from the Year Books,
 and those added in the Margin* wherein this Matter
 came under Consideration. The Persons who gave the
 mortal Wounds, for they were all Cases of Murder, were
 fled from Justice, and only the Persons present and abet-
 ting amefnable. And probably in the other Cases† the
 Fact might be so, though the Reporters are silent as to
 that Circumstance.

FOR I am very clear that the Distinction between Prin-
 cipals and Accessaries of any Kind did not at the Time
 the present Rule was established *affect the Life of the Par-
 ty* upon a Conviction; since as I have elsewhere shewn,
 all were at that Time alike liable to suffer Death, from
 the Principal in the first Degree to the Accessary in the
 lowest. Unless the Privilege of Clergy, which in those
 Days was founded solely on the clerical Function or Ca-
 pacity of the Delinquent, interposed.

BUT in the Construction of Statutes which take away
 Clergy, the Question at present whether Principal or

* 25. E. 3. 44. b. 21. E. 4. 71. a.

† 4. H. 7. 18. a. 13. H. 7. 10. a.

CHAP.

I.

Accessory, is a Matter of extreme Consequence to the Prisoner, it is Life or Death to him. And had a Departure from the antient Rule so far affected the Prisoner's Life upon a Conviction, I am persuaded the Judges would still have adhered to it, notwithstanding the Inconveniences I have mentioned; 'till the Legislature should have thought proper to interpose and provide a Remedy.

THIS Observation may possibly serve to determine the Extent of the present Rule, and at the same Time to evince the Wisdom and Equity of the Resolutions in the Case of *Page* and *Harwood* and the others before cited. The Judges admitted the Rule, that all *present and abetting are Principals*, in it's due Latitude: but did not extend it in all it's possible Consequences, to the Question touching the Allowance or Non-Allowance of Clergy. A Question which did not exist, nor could possibly be in Contemplation, in the Light we consider it, at the Time the Rule was established.

CHAP. II.

Of Accessories in Felony.

SECT. I.

SECT. I.

I HAVE already observed that the Offence of the Accessary though different from that of the Principal, is yet in Judgment of Law connected with it and cannot subsist without it. And that in consequence of this Connection the Accessary shall not *without his own Consent* be brought to Trial 'till the Guilt of the Principal is legally ascertained by the Conviction or Outlawry of *him*, unless they are tried together; and that in this Case the Jury shall be charged to enquire first of the Principal; and if they are satisfied of his Guilt, then of the Accessary. But if the Principal be not guilty, both must be acquitted.

THESE Rules are plain and universally acknowledged, and require no further Proof or Illustration.

THE old Books carry these Rules much further than the Law in it's present State will admit of. For if a Man had been indicted as Accessary in the same Felony to several Persons,

Persons, he could not have been arraigned 'till all the Principals were convicted and attainted; but that Point hath long been otherwise fettled. For as the Law now standeth, if a Man be indicted as Accessary to two or more, and the Jury find him Accessary to one, it is a good Verdict and Judgment may pass upon him. 9. Co. 119.

AND therefore the Court in their Discretion may arraign him as Accessary to such of the Principals who are convicted; and if he be found guilty as Accessary to them *or any of them*, Judgment shall pass upon him. But on the other Hand, if he be acquitted, that Acquittal will not discharge him as Accessary to the others. And when they come in and are convicted and attainted, or if Judgment of Outlawry passeth against them, he may be arraigned *de novo* as Accessary likewise to *them*. "Though, saith *Hale*, it is the safer Course to respite "the Arraignment of the Accessary 'till all appear or "are out-lawed." 1. Hale 624.

THIS Caution he seemeth to ground on the Rigour of the Common-Law in the Case of an *Appeal*. But in his 2^d Vol. he distinguisheth between that Method of Prosecution and an Indictment. In the former the Appellant was obliged to prove the Defendant Accessary to all the Principals, *in Manner as he had counted against him*. But in the Case of an Indictment, that Method of Prosecution being at the Suit of the Crown, he thinketh it sufficient that he be found Accessary to any of the Principals. And to this Purpose he citeth the Authority I have just cited from 9th *Coke*. He was plainly of the same Opinion when he compiled his Summary. p. 201.

I have already said that notwithstanding the Connection between Principals and Accessaries, yet in Consideration of Law their Offences are quite different. And for that Reason I presume it is that if *A* be indicted as Principal and *B*. as Accessary, and both are acquitted, yet *B*. may be indicted as Principal in the same Offence, and his former Acquittal is no Bar. On the other Hand, it seemeth to be agreed, *upon what Grounds I know not*, that if *A*. be indicted as Principal and acquitted, he cannot be afterwards indicted as Accessary *before the Fact*. "For," say some, "it is in Substance the same Offence." Others, "if a Man inciteth Sum. 222. 1. Hale 625. Keil. 25. 26.

CH A P. " inciteth to the Offence, *He is QUODAM MODO guilty*
II. " *of the Fact.*"

IN *Foro Cæli* this is true. In the Sight of God *Abab* was the actual Murderer of *Naboth*. " Hast THOU, " saith God to him by the Prophet, *killed* and also taken " Possession,—In the Place where Dogs licked the Blood " of *Naboth*, shall Dogs lick thy Blood, even thine." And in the Case of *Uriah*, God by another Prophet saith to *David*, " THOU hast killed *Uriah* the *Hittite* with the " Sword, — with the Sword of the Children of *Ammon* " THOU hast slain him."

BUT is it also true in *Foro Sæculi*? By no Means. For in the Eye of the Law the Offences of Principal and Accessary *specifically* differ, and fall under a quite different Consideration. The Point in the Case reported by *Keiling*, which was of an Accessary after the Fact, was at length settled upon sound Principles of Law and Reason. But the Reasoning upon that Case founded on a Distinction between what preceded or was subsequent to the Fact is, I confess, too refined for my Comprehension; and probably will continue so, 'till I can remove antient Land-Marks, and forget the legal Distinction between Principals and Accessaries, and every Principal of Law founded on it. For if the Offences of the Principal and Accessary do in Consideration of Law *specifically* differ; and if a Person indicted as Principal cannot be convicted upon Evidence tending *barely* to prove him to have been an Accessary before the Fact, which I think must be admitted, I do not see how an Acquittal upon one Indictment could be a Bar to a second for an Offence specifically different from it. In the Case I first stated it was no Bar, why therefore in the second?

THIS I offer as a Doubt of my own, which is submitted to the Opinion of the Learned.

SECT. 2. THERE were at Common-Law some other Rules touching the Connection between Principals and Accessaries not, I doubt, perfectly well founded. For if the Principal stood mute of Malice, or challenged peremptorily above the legal Number of Jurors; or refused to answer directly to the Charge, the Accessary could not have been

been put upon his Trial, *because*, say the Books, *the Principal was not attainted*. These Rules seem not to have been founded in the same natural Justice or sound Policy as those I first mentioned.

It would I think have been extremely difficult for a common Understanding *unpractised in artificial Reasoning* to have discovered that the meer Obstinacy of one incorrigible Offender, an Obstinacy too that exposeth him to the severest capital Punishment the Law knoweth of, should by Appointment of the same Law stop the Course of Justice against another. That the Accessary, who frequently is the Leader, Contriver, and *real Principal* in the Villany, should be permitted to bid Defiance to the Justice of the Kingdom; meerly because the Instrument employed by him cannot be prevailed upon to deny the Charge, and put himself upon a legal Trial. And yet this was the Case with Regard to Felony 'till the Statute of the 1st of Q. Anne interposed and provided a Remedy.

See 1. Ann.
Sess. 2. c. 9.

WITH great Submission to the Wisdom of Superiors, I think the Remedy in this Case might have been carried something further. The Mischief at that Time in Contemplation was that the Principal not having been convicted or attainted, no Trial could be had in order to the Conviction of the Accessary. This Mischief the Statute hath provided for. But had it enacted at the same Time that in these Cases the Charge should be taken *pro Confesso*; and that the like Judgment should pass upon the Defendant as upon a Felon convicted by Verdict or Confession, in that Case the Remedy, besides meeting effectually with that single Mischief, would have been better adapted to the Case considered in every other Light.*

In all Cases of high Treason, if the Defendant standeth mute of Malice, or refuseth to Answer directly to the Indictment, this amounteth to a Conviction; and accordingly Judgment as in Cases of high Treason is given. And this Judgment induceth a Corruption of Blood, and all the Forfeitures and Disabilities consequent upon it. This hath not, that I know of, been complained of as any Hardship upon the Criminal; nor can it be considered in that

* 11. 12. W. 3. c. 7. S. 6. the like Provision made in the Cases provided for by that Act.

CHAP.
II.

Light. For it is nothing more than a legal Presumption in Advancement of Justice, *that the Charge which the Criminal will not deny, and put into a legal Method of Trial, is founded in Truth.*

BUT I find I am now getting out of my Sphere, and therefore I will not enlarge.

THE Cases of admitting the Principal to Clergy, or his obtaining a Pardon after Conviction and before Attainder, are likewise provided for by the Statute I last cited. The Accessary may be brought to Justice notwithstanding the Principal hath been so dealt with. And very proper was this Provision. For in the Scale of sound Sense and substantial Justice the only Questions in which the Accessary can have any Concern, *in common with the Principal*, are, whether the Felony was committed, and committed by the Principal. These Facts the conviction of the Principal hath established with Certainty, *at least sufficient to put the Accessary to his Answer.* And therefore in what Manner the Principal may have been treated after his Conviction, seemeth to me to be a Matter perfectly foreign to the Question whether or when the Accessary shall be brought upon his Trial; whatever Notions of Congruity and Proportion in Point of Punishment, founded in the Connection between them, may have been formerly entertained.

SECT. 3.

SECT. 3. AT a Conference among the Judges upon the Case of *M^c Daniel and others* before reported, a general Question was moved how far and in what Cases the Accessary may avail himself of the Insufficiency of the Evidence in Point of Fact, or of the Incompetency of Witnesses in Point of Law, produced against the Principal. And in what Cases he may be let in to shew that the Facts charged and proved against the Principal do not in Judgment of Law amount to Felony. There was in that Case no Occasion to enter far into these Questions; since the Facts upon which the Point of Law then under Consideration must necessarily turn, were all found by the special Verdict. The general Question was therefore waived.

HOWEVER, I will now submit to Consideration a few Things which have occurred to me upon it.

IF the Principal and Accessary are joined in one Indictment and tried together, which I conceive to be the most eligible Course where both are amenable, there is no room to doubt whether the Accessary may not enter into the full Defence of the Principal; and avail himself of every Matter of Fact and every Point of Law tending to his Acquittal. For the Accessary is in this Case to be considered as *Particeps in Lite*, and this Sort of Defence necessarily and directly tendeth to his own Acquittal.

THIS is too plain to admit of further Enlargement.

WHEN the Accessary is brought to his Trial after the Conviction of the Principal, it is not necessary to enter into a Detail of the Evidence on which the Conviction was founded. Nor doth the Indictment aver that the Principal was in Fact guilty. It is sufficient if it reciteth with proper Certainty the Record of the Conviction. This is Evidence against the Accessary sufficient to put him upon his Defence. For it is founded on a legal Presumption that every Thing in the former Proceeding was rightly and properly transacted. But a Presumption of this Kind must, I conceive, give Way to Facts manifestly and clearly proved. As against the Accessary the Conviction of the Principal will not be conclusive; it is as to him *Res inter alios acta*.

AND therefore if it shall come out in Evidence upon the Trial of the Accessary, as it sometimes hath and frequently may, that the Offence of which the Principal was convicted did not amount to Felony in him, or not to that Species of Felony with which he was charged, the Accessary may avail himself of this, and ought to be acquitted. This was the Case of *M^r Daniel and others* lately cited. The Youths who were convicted of the Robbery being totally ignorant of the Conspiracy mentioned in the Report of that Case, took no Advantage of it; and were convicted upon full legal Evidence. But when the whole Scene of Villany came to be disclosed upon the Trial of those Miscreants, they were discharged from that Indictment upon this single Objection, that the Offence of the Principals did not in the Eye of the Law amount to Robbery.

IF this Opinion was well founded in Point of Law, and shall stand the Test of future Times, as I think it will,
every

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II.

every other Person in the like Circumstances may upon his Trial avail himself of it, and will be intitled to a Verdict of Acquittal.

I will by Way of Illustration put another Case. *A.* is indicted for stealing a Quantity of live Fish the Property of *B.* *A.* pleadeth guilty upon his Arraignment, is immediately burnt in the Hand, and discharged. At the next Sessions *C.* is indicted as an Accessary to *A.* in this Felony after the Fact, as the Receiver knowingly. *A.* is produced as a Witness against him, and in the Course of his Evidence proveth that the Fish were taken in a River of which *B.* had the sole and separate Fishery, or in a large Pond upon the Waste of *B.* Might not *C.*, had he been so advised, have insisted that the Fish being at their natural Liberty *A.* had no fixed Property in them, and consequently that the taking of them *in that State* could amount to no more than a bare Trespass? undoubtedly he might.*

OR let me suppose that the Principal is erroneously Attainted, and thereupon the Accessary is brought to his Trial, convicted and attainted. The Attainder of the Principal is afterwards reversed for Error. This reverseth the Attainder of the Accessary. It is true it hath been holden that the Accessary cannot take Advantage of the Error by Way of Plea, he cannot aver against the Record of the Attainder while it standeth unreversed. But *Brooke*, perhaps the most judicious of all the Abridgers, after citing the Case, addeth, *Judex tamen debet habere Discretionem et Æquitatem*. The Accessary ought to have had a reasonable Time to procure, if possible, a Reversal of the Attainder. As where a Prisoner pleadeth a Charter-Pardon, which upon Inspection appeareth not to reach his Case, the Court, presuming that the Crown intended an *effectual* Pardon, will give him a reasonable Time to obtain one.

How far the Accessary can avail himself in Point of Fact by shewing that the Principal was totally innocent is a Question of more Difficulty and should be handled with great

p. 67.
1. Hale 511.

* *Hale*, it is true, doth in his Summary say that taking Fish in a Trunk, Net or Pond is Felony. But in the Work he intended for Publication he is express that Larceny cannot be committed of Fish in a River or Pond. "If," saith he afterwards in the same Page, "in a Trunk or Net, Larceny may be committed of them." See to this Point *Owen* 20. and 9. *Geo.* 1. which maketh it Felony under some special Circumstances to steal Fish in a Pond.

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great Caution. Because Facts for the most Part depend upon the Credit of Witnesses; and when the Strength and *Hinge* of a Cause happeneth to be disclosed, as it may by one Trial, daily experience convinceth that Witnesses for very bad Purposes may be too easily procured. I will therefore before I offer my own Opinion cite one or two Authorities which in my Apprehension are strong in Favour of the Accessary upon the Foot of the *meer Innocence of the Principal*.

I observed before that the Accessary may if he chooseth it be brought to his Trial before the Conviction or Attainder of the Principal. But in Case he be convicted, "It seemeth, saith *Hale*, necessary to respite Judgment 'till the Principal be convicted and attainted. For if the Principal be after acquitted, that Conviction of the Accessary is annulled, and no Judgment ought to be given against him."

1. Hale 623.

THE Principal is outlawed, and thereupon the Accessary is tried, convicted, and executed. The Principal afterwards cometh in, reverseth the Outlawry and pleadeth over to the Felony, and upon Trial is acquitted. This, saith *Coke*, reverseth the Attainder of the Accessary.

9. Co. 119.

I have already premised that in order to convict the Accessary it is not necessary to enter into the Detail of the Evidence upon which the Principal was convicted; and have offered some Reasons for my Opinion. Another weighty Reason occurreth, which it will be sufficient just to mention. The Witnesses against the Principal may be dead, or not to be found, when the Accessary is brought upon his Trial; especially after a long Interval between the Trials.

BUT still if it shall manifestly appear in the Course of the Accessary's Trial, that in Point of Fact, (the Point of Law where the legal Presumption is equally strong against the Accessary I have already spoken to,) if I say it shall appear that the Principal was innocent common Justice seemeth to require that the Accessary should be acquitted. *A.* is convicted upon circumstantial Evidence, strong as that Sort of Evidence can be, of the Murder of *B.* *C.* is afterwards indicted as Accessary to this Murder; and it cometh out upon the Trial by incontestable Evidence that *B.* is still living,

CH A P. II. living, Lord *Hale* somewhere mentioneth a Case of this Kind, is *C.* to be convicted or acquitted? The Case is too plain to admit of a Doubt. Or suppose *B.* to have been in Fact murdered, and that it should come out in Evidence to the Satisfaction of the Court and Jury that the Witnesses against *A.* were mistaken in his Person, a Case of this Kind I have known, that *A.* was not nor could possibly have been present at the Murder.

It must be admitted that meer *alibi* Evidence lieth under a great and general Prejudice, and ought to be heard with uncommon Caution. But if it appeareth to be founded in Truth, it is the best negative Evidence that can be offered; it is really positive Evidence, which in the Nature of things necessarily implieth a Negative. And in many Cases it is the only Evidence an innocent Man can offer. What in the Case I have put are a Court and Jury to do? If *they are satisfied upon this Evidence that A. was innocent*, natural Justice and common Sense will suggest what is to be done in the Case of *C.*

THESE, it may be said, are strong Cases, and seldom happen in Experience. I confess they are strong, and for that very Reason, since I am upon a Subject of some Delicacy and which should be treated with great Caution, I have made Choice of *them*. But if they prove that in any Cases whatsoever the legal Presumption against the Accessary founded on the Conviction of the Principal may be repelled by contrary Evidence, they prove as much as I expected from them. The Rule is right, the Difficulty will lie in the Application of it to particular Cases. How far it is to be carried to Cases probably not equally strong, must, all Circumstances duly weighed and considered, be left to the Prudence, Circumspection, and Abilities of the learned Judges before whom the several Cases may happen to come in Judgment.

I forbear entering further into this Question.

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CHAP. III.

CHAP. III.

Of Accessaries Before and After the Fact.

I WILL now briefly submit to Consideration a few Things touchings Accessaries considered under the well-known Distinction of Accessaries before and after the Fact.

WITH regard to Accessaries Before, I can add very little to what hath been already said in the Case of *The King against M^r Daniel and others* Reported before. Sure I am, it will not become *me* to repeat what was then offered. And therefore I refer the Reader to that Report, and the few Observations I have subjoined to it.

SECT. 1. MUCH hath been said by Writers who have gone before me, upon Cases where a Person supposed to commit a Felony at the Instigation of another hath gone beyond the Terms of such Instigation, or hath in the Execution varied from them. If the Principal totally and substantially varieth, if being solicited to commit a Felony of one kind he *wilfully and knowingly* committeth a Felony of another, he will stand single in that Offence, and the Person soliciting will not be involved in his Guilt. For on *his* Part it was no more than a fruitless ineffectual Temptation. The Fact cannot with any Propriety be said to have been Committed under the Influence of that Temptation.

SECT. 1.

Hale 616.
617.

SECT. 2. BUT if the Principal in Substance complieth with the Temptation, varying only in Circumstance of Time or Place, or in the Manner of Execution, in these Cases, the Person soliciting to the Offence will, if absent, be an Accessary before the Fact, if present a Principal. For the substantial, the criminal part of the Temptation, be it Advice, Command, or Hire, is complied with. *A.* commandeth *B.* to murder *C.* by Poison, *B.* doth it by a Sword, or other Weapon, or by any other Means. *A.* is accessary to this Murder. For the Murder of *C.* was the

A a

Object

SECT. 2.

CHAP. Object principally in his Contemplation, and that is effected.
III.

SECT. 3. SECT. 3. So where the Principal goeth beyond the Terms of the Solicitation, *if in the Event the Felony committed was a probable Consequence of what was ordered or advised*, the Person giving such Orders or Advice will be an Accessary to that Felony. *A.* upon some Affront given by *B.* ordereth his Servant to way-lay him and give him a sound Beating; the Servant doth so, and *B.* dieth of this Beating. *A.* is Accessary to this Murder.

A. adviseth *B.* to rob *C.* he doth rob him, and in so doing, either upon Resistance made, or to conceal the Fact, or upon any other Motive operating at the Time, of the Robbery, killeth him. *A.* is Accessary to this Murder.

OR *A.* soliciteth *B.* to burn the House of *C.*, he doth it; and the Flames taking hold of the House of *D.* that likewise is burnt. *A.* is Accessary to the burning of this latter House.

THESE Cases are all governed by one and the same Principle. The Advice, Solicitation or Orders in Substance were pursued, and were extremely flagitious on the Part of *A.* The Events though possibly falling out beyond his original Intention, were *in the ordinary Course of Things the probable Consequences of what B. did under the Influence, and at the Instigation of A.* And therefore in the Justice of the Law He is answerable for them.

SECT. 4. SECT. 4. IT hath been said that if *A.* ordereth *B.* to kill *C.* and he by Mistake killeth *D.*; or aiming his Blow at *C.* misseth him and killeth *D.* *A.* will not be accessary to this Murder; "*Because it differeth in the Person.*" This is a merciful Opinion. But I cannot think that the Case of *Saunders* cited in support of it, doth warrant the Rule in the Latitude here laid down.

It however suggesteth a Point which may possibly merit Consideration. *B.* in the Case put by the learned Authors last cited, is an utter Stranger to the Person of *C.* *A.* therefore taketh upon him to describe him by his Stature, Dress, Age, Complexion, &c; and acquainteth *B.* when and where he may probably be met with. *B.* is punctual

at the Time and Place and *D.* a Person possibly in the Opinion of *B.* answering the Description, unhappily cometh by and is murdered, upon a strong Belief on the Part of *B.* that this is the Man marked out for Destruction. Here is a lamentable Mistake, but who is answerable for it? *B.* undoubtedly is, the Malice on his Part *Egreditur Personam.* And may not the same be said on the part of *A.*? The Pit he with a Murderous Intention dug for *C.* *D.* through his Guilt fell into and perished. For *B.*, not knowing the Person of *C.* had no other Guide to lead him to his Prey, than the Description *A.* gave him. *B.* in following this Guide fell into a Mistake which it is great Odds any Man in his Circumstances might have fallen into. I therefore as at present advised, conceive that *A.* was answerable for the Consequence of the flagitious Orders he gave; since that Consequence appeareth in the ordinary Course of Things to have been highly probable. This Opinion I ground upon the Reason of the Cases stated in the last Section.

SAUNDERS's Case referred to by the learned Au-Plowd. 473. thors was no more than this. He with Intention to destroy his Wife, by the Advice of one *Archer* mixed Poison in a roasted Apple, and gave it to her to eat. She having eaten a small Part of it gave the Remainder to their Child. *Saunders* at this dreadful Moment made a faint Attempt to have saved the Child; but conscious of the horrid Purpose of his own Heart, and unwilling to make his Wife a Witness of it, desisted; and stood by and saw the Infant he dearly loved eat the Poison, of which it soon afterwards died. It was ruled without much Difficulty that *Saunders* was guilty of the Murder of the Child upon the Reasons already given. With Regard to *Archer*, it was agreed by the Judges upon Conference, that he was not Accessary to this Murder, it being an Offence he neither advised nor assented to. The Judges however did not think it advisable to deliver him in the ordinary Course of Justice by Judgment of Acquittal. But for Example Sake they kept him in Prison by frequent Reprieves from Session to Session 'till he had procured a Pardon from the Crown. A Measure Prudence will often suggest in Cases of a doubtful or delicate Nature.

CHAP. BUT this Case widely differeth from that I have put.
 III. And so doth another stated by *Plowden*. *A.* adviseth
Plowd. 475. *B.* to burn the House of *C.*, which House *B.* well know-
eth. He spareth the House of *C.* and burneth the House
 of *D.* *A.* is not accessory to this Felony.

THE Difference of the Cases, I conceive lieth here.
 In these there was no Mistake on the part of the Father
 or of the Incendiary, for which their Advisers could be
 any ways responsible. The Father stood by and suffered
 the Child to eat the Poison prepared for the Mother;
 the Incendiary wilfully and knowingly varied from his
 Orders, and sparing one House destroyed the other.
 But in the Case I have supposed, the Assassin not know-
 ing the Man marked out for Destruction was misled by
 the Directions *A.* gave him.

I believe the following Criteria will let the most in-
 quisitive Reader into the Grounds upon which the sever-
 al Cases falling under this Head will be found to turn.
 Did the Principal commit the Felony he standeth charg-
 ed with under the Influence of the flagitious Advice, and
 was the Event in the ordinary Course of Things a pro-
 bable Consequence of that Felony? Or did he, follow-
 ing the Suggestions of his own wicked Heart, wilfully
 and knowingly commit a Felony of another Kind or
 upon a different Subject?

SECT. 5. SECT. 5. I shall be very brief upon the general
 Principles of Law touching Accessories after the Fact.
 Because Prosecutions for this Offence grounded on the
 Common-Law have not been frequent, nor have they
 had any great Effect. For as the Law now standeth and
 Practice hath governed, Prosecutions of that Kind, ex-
 cept in a Case I shall presently mention, generally end
 in a slight Punishment if it can be called by that Name;
 or rather a Piece of absurd Pageantry, tending neither
 to the Reformation of the Offender, nor for Example to
 others. I mean what is called burning in the Hand
 with an Iron scarcely heated.

IN the Case of Horse-Stealing, 'tis true, the Statute of
 31. Eliz. c. *Elizabeth* hath taken away Clergy as well from the Acces-
 12. S. 5. sary after, as before the Fact. But it must be observed,
 that

that this Statute extendeth only to such Persons as were **CHAP.**
 in Judgment of Law Accessaries *at the Time the Act was* **III.**
made, namely Accessaries at Common-Law; not to such
 as are made Accessaries by subsequent Statutes. And
 therefore a Person Knowingly receiving a stolen Horse,
 who is made an Accessary by some late Statutes, is not
 ousted. This was agreed by all the Judges at a Con- **MSS. Tracy**
 ference in *Easter Term* in the Second of *Q. Anne.* **and Denton.**

SECT. 6. BY the 3. and 4. *W. and M.* and by **SECT. 6.**
 the 5th of *Q. Anne*, Receivers of stolen Goods knowing- 3. 4. *W. and*
 ly are made Accessaries after the Fact. And by the 4. of *M. c. 9.*
Geo. 1. they are liable to be transported for 14 Years. 5. *An. c. 31.*

BEFORE the Statute of King *William*, Receivers, 4. *Geo. 1. c.*
unless they likewise Received and Harboured the Thief, **11.**

were guilty of a bare Misdemeanour; for which they
 were liable to Fine and Imprisonment, or other corpor-
 al Punishment. But that Act having made them Ac-
 cessaries and consequently Felons, the prosecuting them **MS. Tracy.**
 as for a bare Misdemeanour was held by all the Judges
 at a Conference about the latter End of King *William's*
 Reign to be improper and illegal. For the Misdemea-
 nour was merged and absorbed in the Crime of Felony.
 Just as Felony at Common-Law when made High Trea-
 son by Statute, which hath been done in a few Cases,
 is merged and absorbed in the Treason.

THIS was soon found to be inconvenient. For if
 the Receiver, who generally is the Employer and Pa-
 tron of the Thief, could keep him out of the Way, he
 [the Receiver] passed unpunished. To remedy this
 Mischiefe the 1st of *Q. Anne* provideth that the Re- **1. An. Seff. 3.**
 ceiver may be prosecuted as for a Misdemeanour, *though* **c. 9,**
the Principal be not **BEFORE CONVICTED.** And by
 the 5th of *Q. Anne* he may be so prosecuted, *though*
the Principal cannot be **TAKEN so as to be prosecuted** **c. 31.**
and convicted.

I know Attempts have been made under various Shapes,
 to prosecute the Receiver as for a Misdemeanour while the
 Principal hath been in Custody and Amefnable, *but not*
Convicted. Bnt I think all Devices of that kind are utterly
 illegal. For though the 1st of *Q. Anne* in the strict Letter

CH A P. of it seemeth to be confined to the single Case of the
 III. *Non-Conviction* of the Principal, yet the subsequent Statute, in order to make them both consistent, must be understood as explanatory of the former. Since both Acts plainly provide against one and the same Mischief, viz. *where the Principal abscondeth and is not amenable to Justice*. Which the Preambles of both shew to have been the Mischief in the Contemplation of the Legislature at the Time they were made.

See the Preambles.

THERE is, I confess, a Case in Lord *Raymond* which seemeth to oppose what I have advanced.* But the Opinion said to have been given in that Case weigheth very little with me; and if taken in the Latitude the Words seem to imply is not Law.

P. 1370.

WHERE the Principal is amenable the Prosecutor hath no Option whether to proceed against the Receiver as for Felony or Misdemeanour, he must proceed as for Felony. If he be not amenable and the Prosecutor chooseth to wait for his Conviction he may do so, and then proceed against the Receiver as for Felony: or at his own Pleasure, as for a Misdemeanour, without waiting till the Principal shall be amenable. Under these Limitations, and these only, as I conceive, the Prosecutor hath an Option.

BESIDES, the Judgment of the Court in that Case doth not appear to be founded on the Opinion supposed to have been then given as *the ruling Principle*, but on a much stronger and more rational Motive. The Court would not upon Motion arrest Judgment upon an Exception to the Indictment *which was never taken before*; and which must overset every Judgment that had been given on the Statute. This was a solid and a rational Principle founded in political Justice. For in Cases of this kind, *Communis Error facit Jus*.

FOR the Reasons already offered I shall enter no further into the Learning of Accessaries after the Fact.

THE Discourses of High Treason and Homicide would have been very imperfect if the Learning of Accessories in the one, and of Accessaries in the other had been left

* See the same Case wretchedly reported in 8 *Mod.* 264. wholly

wholly untouched. And I chose to throw my Thoughts on these Subjects into a separate Discourse, rather than to blend them with what is offered under the general Titles prefixed to the other Discourses. For Subjects which bear a near Affinity to each other as these do, are best understood when exhibited together in one Point of View. Because by that Means they explain and illustrate each other.

THIS having been done as far as concerneth Treason in the Light I have considered it, and Homicide in all it's Branches, to which Offences I have confined myself, I have nothing further to offer.

C H A P.
III.

END OF THE DISCOURSE
ON ACCOMPLICES

DISCOURSE IV.
OBSERVATIONS

ON

SOME PASSAGES

IN THE WRITINGS OF

LORD CHIEF JUSTICE *HALE*,

Relative to the Principles on which the Revolution and
present happy Establishment are founded.

DISCOURSE IV.

OBSERVATIONS

ON

Some Passages in the Writings of Lord Chief Justice HALE, Relative to the Principles on which the Revolution and present happy Establishment are founded.

LORD Chief Justice *Hale*, in his History of the Pleas of the Crown, speaking of the Deposal and Resignation of *Edward* the 2d, is pleased to say; “Al-^{1. Vol. 105.} though *Edward* the 2d had a kind of PRETENDED Deposing, and his Son *Edward* 3d took upon him the kingly Name and Office, yet in the Opinion of those Times, *Edward* the 2d continued, as to some Purposes, his Regal Character: for in the Parliament of the 4th of *Edward* the 3d, *Mortimer* and others had Judgment of High Treason given against them for the Death of *Edward* the 2d after his Deposition.” —And a little lower, after citing the Parliament Roll in the Cases of *Mortimer* and Sir *Thomas Berkley*, he addeth; “This Judgment (against *Mortimer*) was not singly on this Account, that he (*Edward* the 2d) was Father to *Edward* the 3d; but that notwithstanding the formal deposing of him, and that pretended or extorted Resignation of the Crown mentioned by the Histories of that Age, yet they still thought the Character *Regius* remained upon him, and the Murder of him was no less than High Treason; namely, the killing of him WHO WAS STILL A KING, though deprived of the Actual Administration of his Kingdom.”

MR. *Prynne* inferreth from these Cases, as his Lord-^{Plea for the}ship doth, that *Edw.* the 2d after his Deposition was still ^{Lords.} reputed a King *de Jure*. ^{P. 329. 460.}

THESE Cases undoubtedly prove that in the Judgment of those Times, the Murder of *Edw.* the 2d was High Treason. But with great Deference to the Opinion of the learned Judge, it will not follow from thence, that this Treason

Treason was considered as a *Breach of Allegiance due to Edw. the 2d*; or that, when the Treason was committed, he was *in the Opinion of those Times* intitled to the Allegiance of the People of *England*.

COMPASSING the Death of the Queen Consort, or of the King's Eldest Son and Heir, these and some other Offences against the Blood Royal, were High Treason at Common-Law and continue so since the Statute. But against whom, in Consideration of Law, are these Treasons committed? Plainly against the Crown and Royal Dignity of the King, against the *Allegiance due to him*; though upon the Persons of those who participate in some of the High Prerogatives of the Crown: for it is of the Essence of High Treason, that it be done *Contra Ligeantiae Debitum*.

De Coronâ King himself. *Bracton* speaking of Offences against the
 Cap. 3. S. 1. Person of the King, saith, "*Videndum est utrum Trans-*
 prope Finem. "*gressio illa quæ tangit Regem gravis fuerit vel levis, sive*
 "*Sibi sive Uxori & Pueris. In Suis vero poterit Rex in-*
 "*juriari.*" *Britton* is more explicit to the present Pur-
 Cap. 22. pose; "*En primes est a dire de Appells de Felonies que poi-*
 "*ent estre faits par Nous & nemye pour Nous sicome de*
 "*Tresen & de Compassment purveu vers nostre Personne*
 "*pour Nous mettre a Mort, ou nostre Compagne, Ou*
 "*Nostre Pere ou Nostre Mere ou Nos Enfauntz.*"

LORD Chief Justice *Coke* is clearly of Opinion, that *Edw. the 2d* after his Deposition was not to be considered in any other Light than as a Person utterly divested of the Regal Character; and consequently that the Judgment against *Mortimer* and others was founded solely on this Principle, that *the Murder of the King's Father was High Treason*. His Words are, "It appeareth by *Britton*, that to
 3, Inst. 7. "compass the Death of the Father of the King was Treason; and so was the Law holden after that: for after
 "*Edw. the 2d* had dismissed himself of the Kingly Office
 "and Duty, and his Son by the Name of *Edw. the 3d* was
 "crowned and King Regnant, *Gourney* and *Ocle* were
 "attainted

“ attainted of High Treason for murdering the King’s
 “ Father, who had been a King by the Name of *Edw.*
 “ the 2d.”

It is certain, that at the Time of these Attainders, there prevailed a very extensive Rule touching Offences against the Blood-Royal, I mean that cited before from *Bracton*, “ *In Suis vero poterit Rex injuriari.*” For at the same Parliament *John Maltravers* and others were attainted of High Treason for compassing the Death of the King’s Uncle the Earl of *Kent*. Rot. Parl. 4. Edw. 3. No. 3. 4.

It must be admitted, that in this Instance Matters were greatly strained against these Men. For the Earl of *Kent* himself had been attainted and executed for Treason or pretended Treason against the King, at a Parliament held at *Winchester* * in this very Year: And the Charge against *Maltravers* and the others touching the Earl’s Death was, † that They by wicked Arts and untrue Suggestions imposed upon his Credulity, and led him into Measures which ended in his own Destruction. This was deemed a Compassing the Death of the King’s Uncle! 4. Rym. 424. 430.

THE only Use I make of this Case is, that since Compassing the Death of the King’s Uncle was High Treason in the Opinion of that Parliament, the same Parliament might by Parity of Reason adjudge the actual Murder of the King’s Father to be so, without considering him as a Person still invested with the Regal Character. The Judgments in both Cases most probably were founded on one and the same Principle, the near Relation *Edw.* the 2d and the Earl of *Kent* stood in to the King. Especially since the Lords could proceed on no other Principle with regard to the former, without supposing the King on the Throne to have been an Usurper during the Interval between his Accession and his Father’s Death.

BUT whether the Murder of *Edw.* the 2d was deemed High Treason, as the Murder of one who was still a King, though deprived of the actual Administration of his King-

* The Roll of the Parliament at *Winton* is not extant. It was called by Writ *Tesse* the 25th of January, 4 *Edw.* 3. Returnable on Sunday before the Feast of St. Gregory. [March 12th]

† See 1 *Hale* 82. the Record of this Judgment which hath been examined by the Roll. And see *Selden’s Privilege of Baronage.* 1st Part, C. 4.

dem,

dom, which Lord *Hale* supposeth to be the Case, will best appear by taking a short View of the publick Transactions at and after his Deposal to the Time of his Death.

Dugd. Sum.
136.

THE Parliament which had been called by *Edw.* the 2d and stood prorogued to the Morrow of *Epiphany* in the 20th of his Reign, met at *Westminster* * at that Time; and unanimously resolved, that the King was not of Ability to govern; that he suffered himself to be led in all Things by wicked Counsels: that he had done what in him lay to ruin his Kingdom and People; and that there appeared no Hopes of his Amendment.

FOR which Reasons they resolved, that the Lord *Edward* the King's eldest Son, should immediately take upon him the Government of the Kingdom, and should be crowned King †.

I am not at present concerned to enquire, whether this Charge was or was not well founded. But admitting that it was, the Parliament proceeded upon a Principle which in the Case of Individuals is perfectly understood and universally assented to. I mean the Right of Self-Defence in Cases of great and urgent Necessity, and where no other Remedy is at hand. A Right which the Law of Nature giveth, and no Law of Society hath taken away.

IF this be true in the Case of Individuals, it will be equally so in the Case of Nations *under the like Circumstances of Necessity*. For all the Rights and Powers for Defence and Preservation belonging to Society, are nothing more than the Natural Rights and Powers of Individuals transferred to and centering in the Body, for the Preservation of the Whole. And from the Law of Self-Preservation considered as extending to Civil Society, resulteth the well-known Maxim, *Salus Populi Suprema Lex*.

I think the Principles here laid down must be admitted, unless any one will choose to say, that Individuals in a Community are in certain Cases, under the Protection of the primitive Law of Self-preservation, but Communities

* *Apologia Adæ de Orleton inter decem Scriptores. Col. 2765*

† The Parliament Roll is not now extant. It was laid before the Parliament in the 10th of *R. 2d*. And probably was destroyed about that Time, or at least before the End of that Reign. So that for want of a better Guide we must follow the History of the Time. See the Questions propounded to the Judges in the 11th *R. 2.* and their Answers cited below.

composed of the same Individuals are in the like Cases excluded. Or that when the Enemy is at the Gate, every single Soldier may and ought to stand to his Arms, but the *Garrison* must surrender at Discretion.

THE Resolution of Parliament just mentioned was notified to the King, then a Prisoner in *Kenelworth* Castle, by a very Solemn Deputation from that Body: when Sir *William Trussel*, in the Name of the rest, and as Procurator of the whole Parliament addressed himself to the King in Terms extremely full, strong, and explicit, which I shall not transcribe; importing that the whole Parliament renounced all Allegiance to him: and thenceforward would consider him as a private Person divested of the Royal Dignity.

Walsing.
A^o 1327.
20. Ed. 2.
Ranulph.
Cistrensis &
Knighton
Eodem A^o

THE young Prince, then about Fourteen Years of Age, was advised to refuse the Offer of the Crown from the Parliament, unless his Father would make an actual Resignation of it unto him: which, it is said, was soon afterwards done.

AND the Commencement of the New King's Reign was fixed by Parliament to the 20th of *January*. And on the 24th his Peace was proclaimed in *London*; as 4. Rym. 243. it was soon afterwards in all other Parts of the Kingdom by Virtue of Writs Teste the 29th.

The Writs ran thus;

“ REX Vicecomit' N Salutem. Quia Dominus Edwardus, nuper Rex Angliæ, Pater Noster, de communi Consilio & Assensu Prælatorum, Comitum, Baronum & aliorum Magnatum, necnon Communitatum totius Regni prædicti, Spontanea * Voluntate se amovit a Regimine dicti Regni Volens & Concedens, quod Nos tanquam ipsius Primogenitus & Hæres, ipsius Regni Regimen & Gubernationem assumamus. Nosque ipsius Patris nostri Beneplacito * in hac Parte de Consilio & Advisamento Prælatorum, Comitum, Baronum, Magnatum, & Communitatum prædictorum annuentes, Gubernacula suscepimus dicti Regni, & Fidelitates & Homagia ipsorum Prælatorum & Magnatum recepimus, ut est Moris.

* The Resignation, if ever he made any, undoubtedly was not matter of Choise. The Merits of the Case will therefore turn upon another Principle.

“ *Deside-*

“*Desiderantes igitur Pacem nostram pro Quiete & Tranquillitate Populi nostri inviolabiliter observari Tibi, præcipimus, quod statim visis Præsentibus per totam Balivam tuam Pacem nostram publice proclamari facias. Universis & Singulis ex Parte nostrâ inhibendo, ne Quis sub Poenâ & Periculo Exhæredationis & Amissionis Vitæ & Membrorum Pacem nostram violare præsumat.*

“*Sed Quod quilibet Actiones & Querelas suas absque Violentiâ quacunque prosequantur secundum Leges & Consuetudines Regni nostri. Nos enim parati sumus & semper erimus Omnibus & Singulis Conquerentibus, tam Divitibus quam Pauperibus, plenam Justitiam exhibere. Teste Rege. &c*

“*Per ipsum Regem.*”

THIS was in those Days the usual Method of notifying the Accession of a new King. And I think stronger Expressions cannot be conceived, importing that the Regal Character resided in the new King, *and in him alone*, than are made use of in this Writ.

ON the First of *February* the King was crowned. And two Days afterwards he held his first Parliament, the same which deposed his Father, and set the Crown on his Head. And at this Parliament begun and ended in the Life-time of *Edward the 2^d* * all the Statutes of the First of *Edward the 3^d* now extant were made. Among others was that for confirming the Banishment of the *Spencers* and indemnifying all Persons who in the late Troubles had taken up Arms in Behalf of the King against his Father. Which the Reader will find in *Rastal's* Statutes and in all the Editions antierior to that Collection.

THERE are in Mr. *Rymer's* Collection of Publick Acts between 30 and 40 Instruments of various Kinds during the Interval between the Deposal and Death of *Edw. the 2d.* in which mention is made of Him; and in those he beareth no Stile approaching nearer to Royalty than either the Lord *Edward* late King of *England* Father of the King, or the Lord *Edward* late King of *England* Our Father, or barely the King's Father. I will cite one of them.

* On the 7th of *August* in the 1st of *Edward the 3d.* Writs issued for calling a New Parliament, and we know that *Edward the 2d.* lived to the 21st of *September* in that Years. *Dugd. Sum. 140. 1. Prynn's Brev. Parl. 25.*

IT

It is a Writ directed to the Sheriff of Oxon, and it reciteth; "*Cum, ut accepimus, Willielmus de Aylmere coram 4. Rym. 304. Dilecto & Fideli nostro Thoma de Berkele (quem Assignavimus Conservatorem Pacis nostræ in Comitatu tuo & in Gloucestriâ) sit Indictatus de Consensu & Abetto ad depredandum Castrum de Berkele, & ad rapiendum Dominum Edwardum de Caernarvon, nuper Regem Angliæ, Patrem nostrum, & ad levandum Populum nostrum de Guerra contra Nos, & eâ Occasione captus, in Prisonâ nostrâ Oxoniæ sit detentus.*"—The Writ then requireth the Sheriff to admit the Prisoner to Mainprise, if he could find sufficient Manucaptors Body for Body, for his Appearance in the Court of King's Bench on the Octaves of St. Michael, "*ad faciendum & recipiendum quod Curia nostra consideraverit in hac Parte.*"

Teste Rege 20. Aug.

A Writ of *Certiorari* of the same Teste and Return issued to Sir *Thomas Berkly* for removing the Indictment. But what was the Issue of this Prosecution I know not. Though I make no Doubt that *Aylmer's* Offence was an Attempt to deliver the King's Father from Prison; and to restore him to the Royal Dignity. For many Attempts of that Kind were made about this Time, which probably hastened the Death of the old King.

I fear I shall be thought to have taken some unnecessary Pains in proving, that *Edw.* the 2d after his Deposition was considered and spoken of in all publick Acts as a Person utterly divested of the Regal Character. For in Truth, the Persons then in Power, to be consistent with themselves, could not speak otherwise of him. And if Mr. *Prynne*, or the Nonjurors of our Time had been the only Persons who had made a Question of it, I should have spared myself the Trouble I have now taken. But the political Mistakes of a Writer of Lord Chief Justice *Hale's* distinguished Merit deserve great Attention; especially when the professed Enemies of the present Government affect to shelter themselves under his Name, as we know they have done, with some Degree of Triumph.

THE learned Judge is of Opinion, that the Parliament of the 4th of *Edward* the 3d considered the Murder of *Edw.* the 2d, as the Murder of him *who was still a King, though*

deprived of the actual Administration of his Kingdom; and that in that Light they deemed it to be High Treason. If they did really entertain this Opinion, what Opinion did they entertain of the King on the Throne, or of themselves and the Body of the Nation? Did they think him an Usurper, and themselves Rebels, during the Interval between the Deposal and Death of *Edw. the 2d*? This would have been an heavy Imputation upon them. And yet if *Edw. the 2d* was, to the Time of his Death, still a King, intitled to their Allegiance, the Charge of Usurpation and Rebellion cannot be avoided.

HIS Lordship, as I have observed, groundeth his Opinion on the Record of the Proceedings against the Murderers of *Edw. the 2d*, and the Earl of *Kent*. But it cannot be said, that there is in this Record any plain, express Declaration of the Sense of the Parliament touching this Matter. It therefore giveth one some Concern, that in a Point of such Moment a Writer of his Lordship's great Candour and distinguished Abilities should pronounce peremptorily touching the Sense of that Parliament, without at least one explicit parliamentary Declaration to warrant him in so doing. Especially when the Notion of *Edw. the 2d*'s supporting the Regal Character after his Deposition, appeareth to be utterly repugnant to a Series of Facts and Declarations, antient to that Parliament, plain, full, and explicit, as Words and Actions can be.

I admit, that if that Parliament could not have proceeded in the Manner they did upon any other Principle than that of *Edw. the 2d*'s sustaining the Regal Character to the Time of his Death, it might have been inferred from these Records, that they did proceed on that Principle. But I hope I have already shewn, that the Judgment of High Treason against the Murderers of *Edw. the 2d* doth not necessarily presuppose the Truth of that Principle; because that Judgment might be, and most probably was, founded on another.

HIS Lordship doth not seem to deny, that, that Judgment might in some Measure be founded on the Rule laid down by *Britton* and *Coke*, *That killing the King's Father was Treason*; but contendeth, that it was not grounded simply on that Opinion: because, he observeth that “in the

“ Parliament-

“Parliament-Roll of the 4th of *Edw.* the 3d, *Edw.* the 1. Hale 105.
 “2d is filed, at the Time of his Death, *Seigneur Lige*,
 “and sometimes *Rex*, as N. 6. the Lords make their Pro-
 “testation, that they are not to judge any but their Peers;
 “yet they declare, that they gave Judgment upon some
 “who were not their Peers in respect of the Greatness of
 “their Crimes, *Et ce per Encheson de Murder de Seigneur*
 “*Lige &c.* And in the Arraignment of *Thomas Lord Berk-*
 “*ly* for that Offence, the Words of the Record are *Qua-*
 “*liter se velit acquietare de Morte ipsius Domini Regis*;
 “Who pleaded, *Quod Ipse de Morte ipsius Domini Regis*
 “*in nullo est inde Culpabilis.* And the Verdict as it was
 “given in Parliament, and the Record is *Quod prædictus*
 “*Thomas in nullo est Culpabilis de Morte prædicti Domini*
 “*Regis, Patris Domini Regis nunc.* So that the Record
 “fileth him *Rex at the Time of his Death.*”

I confess I do not see, that *Edw.* the 2d is in any Part of this Record filed *Seigneur Lige*, or *Rex* AT THE TIME OF HIS DEATH. And it is on that Supposition alone, that his Lordship's whole Argument is built. It is true he is filed *King* and *Leige Lord* in a Proceeding against his Murderers: but this doth by no Means imply, that he was considered as a *King at the Time of the Murder.* For in what Manner is he filed *King* in this Record? Mr. *Prynne* hath given us the Record at large in the Case of *Sir Thomas Berkly.* But as his Copy is incorrect, and as the Proceeding was something singular being a Trial in Parliament by a Jury of Freeholders, I here insert a Copy of the Record examined by the Parliament Roll.

Plea for the
Lords 327.

“PLACITA *Coronæ* tenta coram Domino *Edwardo Re-* Rot. Parl.
 “*ge tertio post Conquestum, in pleno Parlamento suo a-* 4. E. 3. N^o.
 “*pud Westmonasterium, Die Lunæ proximo post festum* 16.
 “*Sanctæ Caterinæ Virginis, Anno Regni Regis ejusdem* [Nov. 25.]
 “*Quarto.*

“*Thomas de Berkele Miles venit coram Domino Rege in*
 “*pleno Parlamento suo prædicto, & allocutus de hoc; Quod*
 “*cum Dominus Edwardus nuper Rex Angliæ, Pater Domi-*
 “*ni Regis nunc, in Custodiâ ipsius Thomæ, & cujusdam Jo-*
 “*hannis Mautravors nuper extitit liberatus ad Salvo-custo-*
 “*diendum in Castro ipsius Thomæ apud Berkele in Comitatu*
 “*Gloucestræ, & in eodem Castro in Custodiâ ipsorum Tho-*

" *mæ & Johannis Murdratus extitit & Interfectus, quali-*
 " *ter Se velit de Morte Ipsius Regis acquietare? Dicit,*
 " *Quòd Ipse nunquam fuit Consentiens, Auxilians, seu*
 " *Procurans ad Mortem suam, nec unquam sciuit de Mor-*
 " *te suâ usque in præsentì Parlamento isto, & de hoc pa-*
 " *ratus est acquietare Se, prout Curia Regis consideraverit.*
 " *Et super hoc quæsitum est ab eo, ex quo Ipse est Dominus*
 " *Castri prædicti & idem Dominus Rex in Custodiâ ipse-*
 " *rum Thomæ & Johannis extitit liberatus ad Salvo-custodi-*
 " *endum, & Ipsi Custodiam Ipsius Regis receperunt & accep-*
 " *tarunt, qualiter Se excusare possit, quin de Morte Ipsius*
 " *Regis respondere debeat? Et prædictus Thomas dicit,*
 " *Quòd verum est, quòd Ipse est Dominus Castri prædicti,*
 " *& quòd Ipse simul cum Johanne Mautravors Custodiam*
 " *Ipsius Regis recepit ad Salvo-custodiendum, ut prædictum*
 " *est. Sed dicit, Quòd eo Tempore quo dicitur Ipsum Do-*
 " *minum Regem esse Murdratum & Interfectum, fuit Ipse*
 " *tali & tantâ Infirmirate apud Bradeley extra Castrum*
 " *prædictum detentus, quòd nihil ei currebat Memoria.*
 " *Et super hoc dictum est ei, Quòd ex quo cognovit, quòd*
 " *Ipse simul cum dicto Johanne Custodiam Ipsius Domini*
 " *Regis obtinuit, ut prædictum est, & Ipse Custodes &*
 " *Ministros sub Se posuit ad Custodiam de Eo faciendam,*
 " *si per aliquam Infirmiratem Se excusare posset, quin re-*
 " *spondere debeat in hac Parte? Et prædictus Thomas di-*
 " *cit, Quòd ipse posuit sub se tales Custodes & Ministros*
 " *in Castro prædicto pro Custodiâ faciendâ, in quibus ipse*
 " *Se confidebat, ut de Seipso, qui Custodiam Ipsius Regis*
 " *simul cum prædicto Johanne Mautravors inde habuerunt,*
 " *unde dicit, quòd Ipse de Morte Ipsius Domini Regis,*
 " *Auxilio, Assensu, seu Procuratione Mortis suæ in nullo est*
 " *inde culpabilis. Et de hoc de Bono & Malo ponit Se super*
 " *Patriam. Ideo venerint inde Juratores coram Domino Re-*
 " *ge in Parlamento suo apud Westmonasterium in Oetabis*
 " *sancti Hillarii proximè Futuri &c. Ad quem Diem venit*
 " *prædictus Thomas coram Domino Rege in pleno Parlamen-*
 " *to suo, ac similiter Juratores, scil. Johannes Darci, Johan-*
 " *nes de Wissham, Willielmus Trussel, Rogerus de Swynneuer-*
 " *ton, Constantius de Mortimer, Johannes de Sancto Phile-*
 " *berto, Richardus de Rivers, Petrus Hussy, Johannes de*
 " *Dynton, Richardus de la Rivere, Robertus Debenhate &*
 " *Richardus de Corveyes, omnes Milites, qui dicunt super*
 " *Sacramentum*

“ Sacramentum suum, Quod prædictus Thomas de Berkele
 “ in nullo est culpabilis de Morte prædicti Domini Edwar-
 “ di Regis, Patris Domini Regis nunc, nec de Assensu,
 “ Auxilio, seu Procuratione Mortis Ejusdem. Et dicunt
 “ Quod Tempore Mortis ejusdem Domini Edwardi Regis,
 “ Patris Domini Regis nunc, fuit Ipse tali Infirmitate
 “ gravatus apud Bradeley extra Castrum suum prædictum,
 “ quod de Vitâ ejus desperabatur. Ideo idem Thomas inde
 “ quietus. Et Juratores quæsi, si idem Thomas unquam
 “ substraxit se Occasione prædictâ, dicunt, Quod Non. Et
 “ quia idem Thomas posuit Custodes & Ministros sub Se;
 “ scil. Thomam de Gourney & Willielmum de Ocle ad Cus-
 “ todiam de ipso Domino Rege faciendam, per Quos Ipse
 “ Dominus Rex extitit Murdratus & Interfectus, datus est
 “ ei Dies coram Domino Rege nunc in proximo Parlamento
 “ suo, de audiendo Judicio suo &c. Et prædictus Thomas
 “ de Berkele interim committitur Radulpho de Nevil Senef-
 “ challo Hospitii Domini Regis &c.”

I have already observed, that *Edw. the 2d* in the Inter-
 val between his Deposition and Death, was most common-
 ly stiled, as he is in the Beginning of this Record, *Domini-
 nus Edwardus nuper Rex Angliæ, Pater Domini Regis
 nunc.* But I would not be thought to infer from this Re-
 cord what may, I think, be reasonably inferred from those
 worded in the same Manner in the Life-time of the King.
 For this being a Proceeding after his Death, he was with
 strict Propriety stiled *Nuper Rex*, whatever Opinion the
 Parliament might entertain concerning him, or the Pro-
 ceedings against him. What I would observe is, that as
 the Words *Nuper Rex* import no more than that he lately
 was King, and do by no means imply that *he continued so
 to his Death*, it cannot be inferred from any Thing in this
 Record, that in the Opinion of that Parliament he did con-
 tinue to bear the regal Character after his Deposition.
 This, I say, cannot be inferred from the Words *Nuper
 Rex*. And the Words upon which his Lordship groundeth
 his Opinion, *Ipsius Domini Regis, Prædicti Domini Regis
 &c. &c.* have in this Record a plain Reference to the Per-
 son named at the Beginning under the Stile of *Nuper Rex*.

It is well known, that in parliamentary Proceedings of
 this Kinds it is and ever was sufficient, that Matters appear
 with proper Light and Certainty to a common Understand-

ing; without that minute Exactness which is required in criminal Proceedings in *Westminster-Hall*. In these Cases the Rule hath always been, *Loquendum ut Vulgus*. And in common Speech when we speak of former Kings, we give them simply the Titles they formerly bore, and nobody mistaketh our Meaning. The Legislature hath very frequently spoken of former Kings in the same Stile. They did so about ten Times in the Case of *Edw. 2d* in the Act for confirming the Banishment of the two *Spencers* before-mentioned. And yet whoever readeth the Act with the least Attention will see that they considered him in no other Light than as a Person utterly deprived of the regal Character. And in the Stile * of the Petitions whereon that Act and others were grounded, he is called King after his Deposition. And so are his Father and Grandfather, when they had been long in their Graves †.

I hope I need not labour this Point.

THE Judgment of High Treason against the Murderers of *Edw. the 2d* hath been already in part considered, But something further remaineth to be said on that Head. Against whom in the Judgment of this Parliament was this Treason committed? Against *Edward the 2d* or *Edward the 3d*? a satisfactory Answer to these Questions will be decisive in the Point. For High Treason being as I have observed an Offence *Contra Ligeantiae Debitum*, if the Parliament considered the Murder of *Edw. the 2d*, as a Treason committed against his Crown and Dignity, they must be supposed to consider him as a Person to whom Allegiance was then due, or, in Lord *Hale's* Words, as still a King, though deprived of the actual Administration. On the other hand, if it was considered as a Treason committed against the Crown and Dignity of *Edward the third*, the Consequence will be, that in the Judgment of that Parliament the Allegiance of the Subject was due to him in the Life-time of his Father. And then the Murder of the

4. Rym. 245. * “*Fait a remember, que le tierce Jour de Fevrier l Ande Roy Edward, Fitz au Roy Edward, Fitz au Roy Edward, Fitz au Roy Henry &c.*”

Dugdale Sum.

† In the Proceedings against *Mortimer* at this Parliament so little Regard was paid to the Forms observed in legal Proceedings that he who had been frequently summoned to Parliament as a Baron, and had been then lately created Earl of *March* and by that Title summoned to four successive Parliaments, is stiled through this whole Record barely *Roger de Mortimer*. Father

Father will fall under the same Rule as Offences of the like Kind against the Blood-Royal did at Common-Law; and as the Offences I have already mentioned still do by Virtue of the Statute of Treasons.

FOR let it be remembered, that in Consideration of Law the royal Majesty of the King is impaired by Outrages of a treasonable Kind done or attempted against the Blood-Royal. The Rule laid down by *Bracton* before cited is founded on this Principle: The Cases put by *Britton* plainly arise out of it: And so do those of the same Kind provided for by the Statute of Treasons. The Principle is still true: only the Statute limiteth and restraineth the Operation of it to the few Cases therein expressed; excluding all others which the Common-Law brought under the same general Rule.

Now whether the Murder of *Edw. the 2d* was considered as a Treason committed against *his* Crown and Dignity, or against the Crown and Dignity of his Son, will appear by taking a short View of the Record of the Proceeding against his Murderers. The general Title introductory to the whole Charge runneth thus, “*Ces Rot. Parl. sont les Tresons, Felonies & Malveistes faites a Nostre 4. E. 3. N° 1. Seigneur le Roi & a son Poeple par Roger de Mortymer & autres de sa Covyne.*” Then follow fifteen Articles against *Mortimer*, by seven of which he is charged with *accroaching* to himself royal Power in the several Instances set forth in the Articles: a Species of Treason well known in those Days*, and of which the prevailing Party in Times of Faction and Violence hath made a terrible Use. By the other Articles he is charged with many high Crimes and Misdemeanours, tending to the Dishonour of the King and the Oppression of the People.

THE Article touching the Murder is to this Effect, “Whereas the Father of our Lord the King was by an Ordinance of the Peers of the Land placed in *Kenelworth* Castle there to remain at his Ease, and to be served as became so great a Lord, the said *Roger*, by royal Power to him *accroached*, took upon himself the Custody of him, and caused him to be removed to the Castle of

* V. 1. *Hale* 80. 81. concerning this Species of Treason.

Berkly. Where by him, and by his Procurement, he
 “ was falsly, traiterously, and feloniously murdered.”

THE Record, after setting forth the Articles, goeth on
 “ to this Effect, “ Wherefore our Lord the King doth
 “ charge the Earls, Barons, and other Peers of the Realm,
 “ that forasmuch as these things *touch him principally*, and
 “ them and all the People of the Realm, that they do unto
 “ the said *Roger* right and lawful Judgment.” And then
 followeth the Judgment, “ That for the said Crimes,
 “ and principally for the Murder of the Lord *Edward*, Fa-
 “ ther of the King, the said *Roger* as a *Traitor and Ene-*
 “ *my of the King* and Kingdom be drawn and hanged.”

Eod. Rot.
 No. 2.

The like Judgment was given against *Simon de Beresford*, as being an Accomplice with *Mortimer* in all his said Treasons, Felonies, and Misdeeds, that he as a *Traitor of the King* and his Realm be drawn and hanged.”

No. 3, 4.

John Maltravers, *Bogo de Bayonne*, and *John Deverel*, whose Case I have already mentioned, had Judgment of High Treason for compassing the Death of the Earl of *Kent*.

No. 5.

GOURNEY and *Ocle*, who were supposed to be the actual Murderers of *Edward* the 2d, had the same Judgment “ *Pour le Mort le Roi Edward Piere nostre Seigneur le Roi que ore est.*”

No. 6.

THE Lords having passed Judgment against these Men, who all, except *Mortimer*, were Commoners, enter their Protestation to the Effect mentioned by *Hale* in the Passage I have already cited.

THIS is the Substance of the whole Record, as far as concerneth the Murder of *Edward* the 2d, except what relateth to the Case of Sir *Thomas Berkly*, which I have already considered.*

No. 8. 9. 10.

11. 12.

* The Parliament Roll of the 4th of *Edward* the 3d is so defaced that the general Title and One or Two of the Articles against *Mortimer* are not tolerably legible; and in some others there are considerable Chasms. It was much defaced when Sir *Robert Cotton* compiled his Abridgment of the Tower Records, and is probably grown worse since that Time. But these Defects may be easily supplied, since the Proceeding is set forth at large in the Parliament Roll of the 28th of *Edward* the 3d which remaineth still legible.

For at that Parliament *Roger de Mortimer* who was Grandson and Heir of him against whom the Judgment was given in the 4th of the King, preferred his Petition complaining that his Grandfather was attainted without being brought to his Answer AGAINST THE TENOR OF THE GREAT CHARTER, and praying that the Judgment of Attainder might be reversed and himself restored in Blood, which was accordingly done. And he was summoned to Parliament in the following Year by the Stile and Title of Earl of *March*; his Father who died before the Reversal never having been summoned.

Dugdale and
 Cotton.

I make Use of the Roll of the 28th compared with that of the 4th where it is legible.

FROM

FROM this Record I think it is evident, that this Murder was considered as a Treason committed against the King then on the Throne, and him alone. For that Species of Treason which they called *Accroaching* Royal Power, which maketh a very considerable Part of the Charge, could never, as I apprehend, in the nature of Things be considered in any other Light than as an Offence against the Crown and Dignity of him who, for the Time being, was actually invested with the Regal Power. And it is remarkable, that this Species of Treason is expressly charged on *Mortimer* in the Article touching the Murder, as one Step taken by him preparatory to that Fact.

BESIDES, the Articles against *Mortimer* and his Accomplices, of which that touching the Murder is one, and upon which the Judgment was principally founded, charge Facts upon them, committed, a few of them before, the much greater Part after the Death of *Edw. the 2d*, but *All after his Deposition*. And yet the whole Charge is introduced with this general Title, "*These are the Treasons done to our Lord the King*;" plainly importing that those Treasons, none excepted, were considered in one and the same View, namely, as done against the King then on the Throne, and him alone, and the Judgment against *Mortimer* and *Beresford*, that they for those Treasons, as Traitors and Enemies of the King and Kingdom, be drawn and hanged, import the same. Nor is there a single Word in the whole Record, declaring, or so much as giving the most distant Hint, that any of the Treasons therein mentioned were committed in Breach of the Allegiance due to *Edward the 2d*.

It is true as his Lordship observeth, he is stiled in the Lord's Protestation, *Seigneur Lige*, and, in the Judgment against *Gourney* and *Ocle*, *le Roy Edward*; but I have already considered, and I hope removed the Objection grounded on that Manner of Expression.

I have nothing to add with regard to the Proceedings against the Murderers of *Edw. the 2d*. but a Difficulty hath been raised; which may be thought to deserve some Notice. And since my Subject leadeth me to it, I will mention it.

IN

Cotton

21. Rich. 2.

IN the 21st of *Richard* the 2d, the Act of the First of *Edw.* the 3d. for confirming the Banishment of the *Spencers*, already mentioned, was repealed. And one Reason given on the Roll is, "That the Act was made by *Edw.* the 3d. at such time as his Father *Edw.* the 2d. was living, *Being very King and in Prison* so that he could not resist the same."

1. Hen. 4. c.

3.

SOME Writers have thought it sufficient to say, that the whole Parliament of the 21st of *Richard* the 2d. and every Thing done in it, is annulled by the 1st. of *Henry* the 4th. But this Answer will not remove the Difficulty if there be any in the Case. For the Objection is not founded on any legislative or judicial Act, those Acts are undoubtedly repealed, but barely on the *Opinion* of that Parliament. And the Sense of Parliament, it is said, touching any past Transaction, will be of equal Weight whether it's legislative or judicial Acts continue in Force or no.

THIS is admitted. But it must be likewise admitted, that if the Opinion of a single Parliament, unsupported by Fact or Principle, is to turn the Scale, every Resolution of the same Parliament, considered as Matter of *meer Opinion*, will be of equal Weight. If this be granted me, I will as shortly as I can state a Resolution of this Parliament upon some very constitutional Points: and then leave it to the Reader's Judgment, how far its bare Opinion is to be regarded.

Rastal's Stat.

10. R. 2.

IN the 10th Year of this King a Commission of a very extraordinary Nature issued under the Great Seal, and had the Confirmation of Parliament. By it the Duke of *Gloucester*, and some others, by Name, and the Chancellor, Treasurer, and Keeper of the Privy Seal are constituted the King's great and standing Council for one Year, for the Purposes mentioned in the Commission. The Commissioners Powers were very large, and were thought to be derogatory to the royal Prerogative. And therefore the King and his Ministers, soon after the Dissolution of the Parliament, entered into Measures for defeating this Commission. One Expedient was to take the Opinion of the Judges upon the whole Proceeding; a Refuge constantly open to a corrupt Administration, though, be it spoken to the Honour of the Profession, not always a sure one; even while the

the Judges Commissions were determinable at the Pleasure of the Crown.

To this End, the Judges were summoned to attend the King at *Nottingham*: and the two Chief justices, and three Puisnes did attend, and gave Answers to ten Questions which were propounded to them in the King's Presence. Some of their Answers were to this Effect,* That those who procured the Statute and Commission just mentioned were to be punished with Death, except the King would pardon them: as were also those who moved the King to consent to the Statute. And that as well the Person who moved in the last Parliament, that the Statute whereby *Edward* the 2d was deposed should be laid before the Parliament, as he who in Pursuance of that Motion carried the same into Parliament, are *Traitors and Criminals to be punished with Death*.

THERE were two other Questions, which with the Answers I think worth transcribing.

“SIXTH Question, Whether after in a Parliament assembled, the Affairs of the Kingdom, and the Cause of calling that Parliament are by the King's Command declared, and certain Articles limited by the King, upon which the Lords and Commons in that Parliament ought to proceed, if yet the said Lords and Commons will proceed altogether upon other Articles and Affairs, and not at all upon those limited and proposed to them by the King, until the King shall have first answered them upon the Articles and Matters so by them expressed, *although the King's Command be to the contrary*; whether in such Case, the King ought not to have the Governance of the Parliament, and effectually overrule them, so as that they ought to proceed first on the Matters proposed by the King; or whether on the contrary, the Lords and Commons ought first to have the King's Answer upon their Proposals, before they proceeded further.”

To which Question they answered unanimously, “that the King in that Behalf hath the Governance, and may

* See *Rastai's* Stat. 21 *Rich.* 2 and 1. State Trials. *Knigh-ton* inter decem Script. Col. 2694.

“appoint

“ appoint what shall be first handled, and so gradually
 “ what next in all Matters to be treated of in Parliament,
 “ *even to the End of the Parliament* : and if any Persons
 “ shall act contrary to the King’s Pleasure made known
 “ therein, *they are to be punished as Traitors.*”

“ EIGHTH Question, Since the King can, whenever
 “ he pleaseth, remove any of his Judges and Officers, and
 “ justify or punish them for their Offences; whether the
 “ Lords and Commons can without the Will of the King
 “ impeach in Parliament any of the said Judges or Offi-
 “ cers for any of their Offences.”

To which they unanimously answered, “ That they
 “ cannot, and if any one should so do, *he is to be punish-
 ed as a Traitor.*”*

In this Manner did these Judges prostitute their *sacred*
 Character! But a Prostitution so gross could not long ef-
 11. Rich. 2. cape a publick Censure. And at the next Parliament
 a Censure sufficiently severe, and not warranted by any
 known Rule of Law, did pass upon them. *Their own*
Measure was meted out to them. † But in the 21st. of
 the King, those Questions with the Judges’ Answers hav-
 ing been read over in full Parliament, “ It was demanded
 21. Rich. 2. “ of all the Estates of the Parliament, how they thought
 “ of the Answers aforesaid. And they said, that they
 “ thought the said Justices made and gave their Answers
 “ *as good and lawful liege People of the King ought to do.*”

A Parliament that could solemnly adopt Principles, so
 contrary to the whole Tenor of the Statute of Treasons,
 anti-constitutional in every Point of View, subversive of
 the undoubted Rights of Parliament, and of all Freedom of
 Debate in either House, such a Parliament must, unless
 under an actual Force, which most probably was the Case,
 be the willing Tools of despotic Power. And in either
 Case, its bare Opinion deserveth no manner of Regard.

I will now consider some other Passages in the History
 of the Pleas of the Crown, of much the same Tendency

* These Questions and Answers being copied from a mo-
 dern Translation, differ in Stile from *Rastal* and the older
 Editions of the Statutes but in Sense and Substance they a-
 gree with all of them.

† See 1st. State Trials, the Proceedings against Chief
 Just. *Tresilian* and others.

with

with that I have already examined. The learned Author *1. Hale 60.* asserteth with great Truth, that a King *de Facto*, in the *61. 101. 103.* full and sole Possession of the Sovereignty, is such a King, *103.* against whom High Treason may be committed within the Statute of Treasons. And addeth that Treasons against a King *de Facto*, not being *Attempts in Aid of the rightful Heir*, may be punished in the Time of a King *de Jure*; and that those who have assisted the Usurper, though in actual Possession of the Crown, have on the Regress of the Crown to the right Heir suffered as Traitors.

I fear it will avail very little towards the settling any Point of Law or Rule of Right, to enquire in what Manner Princes on such Revolutions as those alluded to in these Passages by the learned Author, have treated either their Friends or their Enemies. It is not to be imagined, that they will consider the former as Traitors for Acts of Hostility done or attempted in Aid of themselves. I verily believe no Prince in his right Senses ever did. His Lordship *1. Hale 61.* doth indeed in the Passages just cited mention the Case of *103.* Sir Ralph Grey; and supposeth, that he was punished in the Time of *Edw. the 4th* for Treasons committed against Henry the 6th in *Aid of Edw.* But I doubt that Case will not warrant any such Supposition.

SIR Ralph was taken in actual Rebellion against *Edw. the 4th* some Years after he had been in full Possession of *4 Ed. 4. 20.* the Crown; and was beheaded for that Treason, and for that alone; as many more were at the same Time. He was likewise degraded. And the Book saith, that the Reason of his Punishment "*En tiel Manner*" (by Degradation, as I understand the Book) was "*pur Cause de son Perjury & Doubleness que il avoit fait al Roy Hen. 6. jades Roy &c. [* & auxi al Roy Edward le Quart que ore est*"] He had, it seems, acted a Part truly infamous, had betrayed both Sides, had broken his Faith to both Kings. And for this Duplicity he was, by a peculiar Brand of Infamy, distinguished from those who suffered with him for the same Treason. All were beheaded, he alone was first degraded.

* The Words between the Hooks the learned Judge hath omitted.

WITH

WITH Regard to the Measures which have been observed towards the Enemies of a new Government, after a long Struggle and much Blood-shed, our History furnisheth Instances more than enough, of a most unwarrantable Revenge taken by the prevailing Faction. The Acts of Attainder passed against the Chiefs of the *Lancastrian* Party in the first Year of *Edw.* the 4th, which the learned Judge alludeth to in the Places last cited, were of that Kind: to be accounted for only by the Heat and Violence of the Times; never to be drawn into Precedent.

FOR *Henry* the 6th had been in full Possession of the Crown almost 40 Years by lineal Descent, and under a parliamentary Settlement; in which the whole Nation had acquiesced for 60 Years. The Fortune of War did at length decisively turn the Scale in Favour of *Edw.* at the Battle of *Towton-Field*: but with the Loss of near 40000 *English* Subjects, who fell on that Day. And at such a Juncture, to what Lengths cannot the Sweets of Revenge, the Joys of Conquest, the Prospect of rich Plunder in a Plenty of Confiscations, with a misgiving Heart still dreading the final Issue of Things,—to what Lengths of Violence cannot these Incitements carry the vindictive, the ravenous, the timid, blustering Mortals, who upon such Revolutions either take the Lead, or join in the Cry! At Seasons such as these, the still Voice of Law and Reason is seldom heard.

I fear it was little attended to in the Case of any of the Attainders passed on either Side during the unnatural War between the two Roses. Nor ought any of those Attainders to be considered as Cases from which the Principles of Law can be deduced. For, as his Lordship elsewhere with a Candour habitual to him observeth, “Parliaments have
1. Hale 274. “been always obsequious enough to the Victor; and ready to pass Attainders for his Safety and their own.”

His Lordship admitteth, that a temporary Allegiance was due to *Henry* the 6th as being King *de Facto*. If this be true, as it undoubtedly is, with what Colour of Law could those who paid him that Allegiance before the Accession of *Edw.* the 4th be considered as Traitors? For call it a temporary Allegiance, or by what other Epithet of Diminution you please, still it was due to him while in full
1. Hale 61. Possession

Possession of the Crown. And consequently those who paid him that due Allegiance, could not with any sort of Propriety, be considered as Traitors for doing so.

THE 11th of *Henry* the 7th, though subsequent to these 11 Hen. 7. 1. Transactions, is full in point. For let it be remembered, that though the enacting Part of this excellent Law can respect only future Cases, the Preamble, which his Lordship doth not cite at large, is declaratory of the Common-Law; and consequently will enable us to judge of the Legality of past Transactions. It reciteth to this effect, "That the Subjects of *England* are bound by the Duty of their Allegiance to serve their Prince and Sovereign Lord for *the time being* in Defence of him and his Realm against every Rebellion, Power, and Might raised against him. And that whatsoever may happen in the Fortune of War against the Mind and Will of the Prince, *as in this Land some time past it hath been seen*, it is not reasonable, but against all Laws, Reason, and good Conscience, that such Subjects attending upon such Service should suffer for doing their true Duty and Service of Allegiance." It then enacteth, that no Person attending upon the King for the time being in his Wars shall for such Service be convict or attain of treason or other Offence by Act of Parliament, or otherwise by any Process of Law.

HERE is a clear and full parliamentary Declaration, that by the antient Law and Constitution of *England*, founded on Principles of Reason, Equity, and good Conscience, the Allegiance of the Subject is due to the King for the time being, and to him alone. This putteth the Duty of the Subject upon a rational and safe Bottom. He knoweth that Protection and Allegiance are reciprocal Duties. He hopeth for Protection from the Crown, and he payeth his Allegiance to *it* in the *Person* of him whom he seeth in full and peaceable Possession of it: He entereth not into the Question of Title. He hath neither Leisure nor Abilities, nor is he at Liberty to enter into that Question: But he seeth the Fountain, from whence the Blessings of Government, Liberty, Peace, and Plenty flow to him; and there he payeth his Allegiance. And this excellent Law hath secured him against all After-Reckonings on that Account.

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IT being admitted, that Allegiance is due to a King *de Facto* in the full and sole Possession of the Crown, it will follow that a Person absolutely out of Possession, but claiming Title, is not to be considered as a King within the Statute of Treasons; which the learned Judge 1. Hale 104. supposeth to have been the case of the House of York during the Reigns of the three *Henrys*.

I would ask therefore, at what point of Time can it be said, upon any known Principle of Law, that the Bond of Allegiance due to *Hen. 6.* for Instance, ceased? When did he first become a meer Disturber, and his Adherents Traitors, and Rebels? It will be impossible to maintain that they became so the Moment *Edward* marched into England to revenge the Death of his Father, who fell at the Battle of *Wakefield* on the 30th of *December* 1460. The learned Judge doth not contend that they did. And I freely acknowledge it would be high Presumption in me to attempt to determine with Precision, from any known Rule of Law, at what Point of Time they did become so.

IT is very true, that *Edward's* first Parliament made not the least Difficulty of fixing the Commencement of his Reign to the 4th of *March* 1461. (the Year considered as commencing the first of *January*.) About which Time, the Gates of *London* having been opened to him, his own Party supported by his Army proclaimed him there. And his Lordship in Conformity to the Judgment of that Parliament, fixeth the Commencement of *Edward's* Reign to the same Day; and from that Day pronounceth *Henry* the 6th a meer Disturber, not so much as a King *de Facto*.

BUT surely, a military Recognition of *Edward's* Title, *flagrante Bello*, for it was nothing more, and the Triumph of one Week at most that immediately followed it, cannot with any Sort of Propriety be said to have put him into the real, actual Possession of the Sovereignty. His Victory at *Towton-Field* a few Weeks afterwards did indeed put an End to the Competition. And in Consequence of that, Writs issued on the 23d of *May* returnable the 6th of *July* for calling a Parliament; which by reason of some remaining Troubles in the Kingdom never met. On the 29th of *June* he was crowned, and upon the 4th of *November* he

he held his first Parliament, for which the Writs bore *Teste* the 26th of *July*.

Dugdale.

THIS Parliament, as I before observed, fixed the Commencement of his Reign to the 4th of *March* 1461. But I doubt the Incitements before mentioned had too great a Share in this Measure. For by this Retrospect to the 4th of *March*, they gave themselves some Colour, and but a Colour of Law, for attainting many of the Chiefs of the Lancastrian Party for the share they had in the Battle of *Cotton-Towton-Field* on the twenty ninth of that Month, and afterwards in some smaller Actions, before Matters were thoroughly settled. Here, I say, the prevailing Party assumed the Colour of a legal Procedure. But they had not even the Colour of Law, for attainting those of the Lancastrians who bore a Part in the Actions at *Wakefield*, and at other Places; all antecedent to the Time at which *themselves* had fixed the Commencement of *Edward's* Reign, and the Period of *Henry's*. And yet Acts for that Purpose did pass at this Parliament. Though the Faction of *York* had affected to govern in the Name of *Henry* then actually their Prisoner from the Middle of *July* 1460, to the Middle of *February* following, if not longer; as appeareth by many publick Acts in *Rymer's* Collection.

Cotton.

1 Ed. 4. N^o

20. 24.

Ibid. N^o 17.

19. 25.

11. Raym. 458.

to 471.

ONE of them is too remarkable to be lightly passed over. It is a Commission from *Henry* himself to his Competitor, *Teste* so late as the 12th of *February*, for raising Forces in *Bristol* and the neighbouring Counties, for subduing, chastising, and bringing to Justice certain Rebels and Traitors then in Arms against the King. Meaning the Queen, the Prince, and other Chiefs of the Lancastrian Party then at the Head of a formidable Army, in Defence of the King's Person and Government. *

WHAT

* "Rex præcharissimo Consanguineo Nostro Edwardo Duci Eborum, Salutem,
"Sciatis quod Quidam Subditorum Nostrorum, qui veri Ligei Nostri esse debent & tenentur, Diabolicâ Fraude seducti, in Numero non modico Modo
"Guerino arraiati — se propriâ Temeritate & Audaciâ congregarunt, — &
"de Tempore in Tempus Alios Quoscunque, ad Statum Nostrum & Regni Nostri
"Politicum Regimen subvertendum, Sibi congregant & congregare intendunt,
"Nos eorum Temeritati, Præsumptioni & Audaciâ obviare volentes, ac de
"Nobilitate, Strenuitate, & providâ Circumspectione Vestris, plenius confidentes,
"Assignavimus Vos, ac Vobis plenam committimus Potestatem, ad advocandum
"Vobis Omnes & Singulos Ligeos Nostros Villæ Bristolæ — ad proficiscendum
"Vobiscum contra præfatos Præsumptores atque Rebelles Nostros — ad eorum
"Præsumptionem, Temeritatem & Audaciam reprimendum — & si Res exigerit,
"tanquam Hostes & Rebelles Nostros procedendum, & eosdem Expugnandum,

C c

"Damus

DISCOURSE IV.

WHAT Contradictions cannot the Lust of Power reconcile! To what dirty Expedients cannot Ambition sometimes stoop!

THE Cases cited by the learned Judge do not in the least shake the Principle already advanced, that the Throne being full, any Person out of Possession, but claiming Title, be his Pretensions what you please, is no King within the Statute of Treasons.

Keil. 15.

I am aware of the Judgment of the Court of King's Bench in the Case of *Sir Henry Vane*, "That King *Charles* the Second, though kept out of the Exercise of the kingly Office, yet was still a King both *DE FACTO* and *de Jure*: and that all Acts done to the keeping him out were high Treason."

SIR Henry Vane's was a very singular Case, and the Transactions in which he bore a Part happened in a Conjunction of Affairs which never did exist before, and I hope never will. An Usurpation founded in the Dissolution of the antient legal Government, and the total Subversion of the Constitution.

I will therefore say nothing to the Merits of the Question more, than that the Rule laid down by the Court involved in the Guilt of Treason, every Man in the Kingdom who had acted in a publick Station under a Government possessed *in Fact* for twelve Years together of Sovereign Power; but under various Forms at different Times, as the Enthusiasm of the Herd or the Ambition of their Leaders dictated.*

BUT this Resolution hath not in the least shaken the Principle I contend for; it doth in Reality suppose the Truth of it. For if *Charles* the Second was King *DE FACTO* from the Death of his Father, every Thing done from

"*Damus etiam Universis & Singulis Ligeis & Subditis Nostreis — firmiter in Mandatis, quod Vobis in Executione Præmissorum intendentes sint. — aliis quibus Mandatis, Commissionibus seu Proclamationibus perantea Factis non obstantibus.*"

"*Teste Rege apud Westmonasterium*

"*Duodecimo Die Februarii*

"*Per Concilium.*"

2. St. Tri.
159.

* Lord Chief Justice *Hale*, when of high Rank at the Bar, took the Engagement, "To be true and faithful to the Commonwealth of England without a King or House of Lords." This in the Sense of those who imposed it, was plainly an Engagement for abolishing kingly Government, at least for supporting the Abolition of it. And with Regard to those who took it, it might, upon the Principles of *Sir Henry Vane's* Case have been easily improved into an Overt-Act of Treason against King *Charles* the Second.

that

that Time in Prejudice to his Right was undoubtedly high Treason.

THE only Difficulty is, what did the Court mean by a King *de Facto*? They could not mean, what every Soul before themselves understood, a King in the actual and full Exercise of the regal Power. They meant, I presume, as his Lordship upon another Occasion is pleased 1. Hale 104. to express himself, one QUASI in Possession of the Crown; since during the Usurpation, no other Person did claim to act under the regal Title.

THE Distinction between *de Jure* and *de Facto* Kings, was taken up by the House of York to serve the Purposes of Ambition and Revenge. By the former they meant those who are presumed to have succeeded to the Crown in a regular Course of Descent. By the latter, those who have not had that Claim to it. The former were in their Estimation the only rightful Kings. The latter, not excepting such as have claimed under a parliamentary Settlement, no better than fortunate Usurpers.

THIS Doctrine perfectly suited the Views of that Faction. For the Crown having been entailed by Act of Parliament on Henry the Fourth and his Issue, the House of York saw itself totally excluded; unless it's Pretensions could be supported by a Title PARAMOUNT to the Power of Parliament. Proximity in Blood was it's only Refuge, and to that the Partizans of that House resorted. And in so doing they brought upon themselves, in my Opinion, the whole Guilt of that Deluge of Blood, which was afterwards spilt in the unnatural War between the two Houses. 7. H. 4. 2.

It is not to be wondered at that Men whose Ambition suggested to them the Hope of over-turning an Establishment, to which themselves, their Ancestors, and the whole Nation had submitted for more than half a Century, should endeavour to convince Mankind of the Rectitude of their Intentions and the Justice of their Claim. Nor is it at all surprizing, that their Followers, in the *Heat of the Times*, should suffer themselves to be easily convinced. For in the Ferment of Parties, *Leaders never blush, and the Herd of the Party seldom think*. But, that Persons who are placed at an happy Distance from those disastrous Times, should in cool Blood revive and adopt a Doctrine, which

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hath once laid their Country waste, is not so easily accounted for.

BUT since this hath been done by learned Men, among whom Lord Chief Justice *Hale's* Name must be mentioned with all just Regard, I will endeavour to point out what I take to have been the radical Mistake, which led them into a Train of specious, but false Reasoning upon this Subject.

THEY seem not to have sufficiently attended to the Nature and Ends of civil Power, whereof the regal Dignity is a principal Branch. They seem to have considered the Crown and royal Dignity meerly as a descendable PROPERTY: as an Estate or Interest vested in the Possessor for the Emolument and Grandeur of himself and Heirs, in a regular invariable Course of Descent. And therefore in Questions touching the Succession, they constantly resort to the same narrow Rules and Maxims of Law and Justice, by which Questions of meer Property, the Title to a Pigstye or a Laystall, are governed. And thence conclude, that the Legislature itself cannot without manifest Injustice, interrupt the antient, legal, established Order of Succession. It cannot, say they, without Injustice, give to one Branch of the Royal Family, what by Right of Blood belongeth to another.

THUS they argue. And if I could conceive of the Crown, as of an Inheritance of *meer Property*, I should be tempted to argue in the same Manner. But had they considered the Crown and Royal Dignity, as a descendable OFFICE, AS A TRUST for Millions, and extending it's Influence to Generations yet unborn; had they considered it in that Light, they would soon have discovered the Principle upon which the Right of the Legislature to interpose in Cases of Necessity is manifestly founded. And that is the SALUS POPULI, already mentioned upon a like Occasion.

THERE is and for many Ages past hath been, a certain Order of hereditary Succession established among us. But it was for the Sake of the whole, and to avoid the many Inconveniencies to which an uncertain Succession is subject, that this Order of hereditary Succession ever took Place. For Nobody can say, that this or any other Particular

cular

cular Mode of Government is founded in natural Right. Nature discovered the Necessity of civil Government, but the several Modes of it are either Matters of Choice or resulting from meer Necessity or Accident.

HEREDITARY Succession in monarchical States is nothing more, than an expedient in Government founded in Wisdom and tending to publick Utility. And consequently whenever the Safety of the Whole requireth it, this Expedient, like all Rules of meer positive Institution, must be subject to the Controul of the supreme Power in every State. Otherwise a Nation will in numberless Cases that might be mentioned, find itself under a fatal Necessity of sinking into Ruin, inevitable and irretrievable. But certainly no Nation was ever doomed to submit to the greatest of all Evils, out of pure Deference to a prudential Expedient. This is too absurd to be conceived.

LET me add, that in the Parliamentary Settlement already mentioned and in those I shall mention, (the Powers delegated to *Hen.* the 8th only excepted,) the Legislature hath proceeded upon a full Conviction of the Utility of this Expedient. For when it hath upon emergent Occasions excluded one Branch of the Royal Family claiming by Descent, it hath constantly established another in a Course of Hereditary Succession. Title by Descent was always esteemed by the Legislature a wise Expedient in Government. But in Cases of Necessity, it was never thought to confer an indefeasible Right. Because that would have been, *to defeat the End for the Sake of the Means.*

I have said that those who have revived the Doctrine upon which the House of *York* founded it's Claim, are constantly resorting to the same narrow Rules by which Questions of meer Property are governed. I doubt I was a little too hasty in that Observation. For in the Case of the Crown, they exclude one Rule which entereth into all Questions of meer Property, and is evidently founded in publick Utility. I mean that whereby a Right is acquired, or, which in the Issue of Things will amount to the same, the Remedy is barred by Possession, Acquiescence, and Effluxion of Time. The Principle on which this Rule is founded is plainly this, the Publick Good must always be preferred to the Interest of Individuals. And the Pub-

lick Good evidently requireth that Property should not lie open to perpetual Litigation.

Hale's History of the Common-Law. 78.

THIS they will not deny in the Case of private Rights: But in the Case of the Crown, they say the Remedy of the rightful Heir is not barred even by Possession and Acquiescence for many Ages or Descents. Give me leave to ask, what is this Remedy? what hath it been in all Ages and Nations? nothing less than the Calamities of an intestine War. A Remedy infinitely worse than the Disease.

IT was admitted, that the Remedy by civil Suit is barred by Possession and Effluxion of Time, and that Public Utility requireth it should be so. And can it be imagined that the most dreadful of all Evils, is the only Remedy that is never to be barred? the Rule I have already pointed to, *Salus Populi*, furnisheth a clear and ready Answer.

I have nothing at present to add upon the Foot of Reason and Publick Utility, except it be to refer the Reader to what hath been already offered in a similar Case touching the Right of Self-Defence, grounded on the primitive Law of Self-Preservation. One Clue will in both Cases lead him very safely through all the Difficulties, which the Enthusiasm of Party hath thrown in his Way.

I will now consider the Question upon the Foot of Historical Evidence, and the Principles of our Constitution.

I do not intend to enter minutely into the History of the Succession. That Part hath been undertaken by others, and well executed. I shall confine myself to a few Acts of Parliament.

I have already taken Notice of the Entail in Favour of *Henry* the Fourth and his Issue: that in Favour of *Henry* the Seventh and his Issue will be barely mentioned. I proceed to the Time of *Henry* the 8th. The Statute of the 28th of that King passed after his Marriage with the Lady *Jane Seymour*, after declaring the King's Marriage with Queen *Katherine* void, and his Marriage with *Anna Boleyn* likewise void, and the Issue of both Marriages illegitimate, limiteth the Crown to the Sons of the King and Queen successively and the Heirs of their Bodies, Remainder to the King's Sons by any future Wife in like manner, Remainder

to the Daughters of the King and Queen successively and to the Heirs of their Bodies.

AND after reciting, that if the King should die without lawful Issue, no Provision having been made in his Life-time touching the Succession, the Realm in that Case would be destitute of a lawful Governour, "or
" else percase *incumbered with such a Person that would*
" *covet to aspire to the same; Whom the Subjects of this* See the Act.
" *Realm shall not find in their Hearts to love, dread and*
" *obediently to serve, as their Sovereign Lord,**" it goeth on to impower the King in Default of Issue of his Body, by Letters Patent or by last Will, to limit the Crown to such Person or Persons in Possession or Remainder, and according to such Estate, and after such Manner, Form, Fashion, Order, and Condition, as he shall judge expedient.

IT further enacteth, that the Persons so to be appointed shall enjoy the Crown subject to the Limitations and Conditions, in like manner "as if they had been *lawful*
" *Heirs to the same, or as if the Crown had been given* See the Act.
" and limited to them plainly and particularly by special
" Names and sufficient Terms, by *full and immediate*
" *Authority of the High Court of Parliament.*"

THE 35th of the King, which is strongly enforced by 35. H. 8. c. 1.
the first of *Edward* the 6th, reciting the last Act, enacteth 1. Ed. 6. c.
and declareth, that in Default of lawful Issue Male or 12. S. 9.
Female of the King and Prince *Edward*, the Crown shall be and remain to the Princess *Mary* the King's Daughter and the Heirs of her Body, upon such Conditions as the King shall appoint by Letters Patent or last Will; Remainder to the Lady *Elizabeth* in like manner. And if

* This seemeth to be pointed at *James* the 5th of *Scotland* who was at this Time the next in Succession upon Failure of the King's Issue: not barely as being descended from the Union of the two Roses, but under a Parliamentary Entail in Favour of *Henry* the Seventh and the Heirs of his Body, made before that Union took Place. I mean before the King's Marriage with the Princess *Elizabeth*; and consequently to the Exclusion of her and the whole House of *York*.

But notwithstanding the near Relation the House of *Stuart* stood in to the Crown of *England*, *Scotland* was during all King's *Henry's* Reign, the same detested Enemy it had been for Ages past. And a national Prejudice operated in both Kingdoms as strongly as ever. But that Prejudice was happily, in great Measure, worn out by Time and a Change of Circumstances before the Accession of our *James* the First. For upon the Murder of his Father and the Expulsion of his Mother which soon followed, *French* Counsels no longer prevailed in *Scotland*. Queen *Elizabeth* took the infant King and the Reformers, who were the governing Party and had the popular Interest, under her Protection. And the King on his Part preserved at least the Appearance of strict Amity with her to the Time of her Death.

Rot. Parl.

1. H. 7.

See Bacon's

H. 7. an Account of this Matter.

Λ° 1567.

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they shall both fail in performing the Conditions, or die without Issue, the King is again impowered to limit the Succession, as by the last Act.

THE Legislature in these Acts evidently proceeded upon a full Conviction of the Truth and Utility of both the Principles already mentioned, namely, that, no Act of the Legislature intervening, the Crown and Royal Dignity ought to descend from Ancestor to Heir in a certain established Course of Descent. But that this Course of Descent is subject to the Controul of the Legislature.

THE former Act declareth the Princesses *Mary* and *Elizabeth* illegitimate. The latter, upon a *Supposition of their Illegitimacy*, postponeth them even to all the lawful Issue *Female* of the King; and yet, in Default of lawful Issue of the King and Prince, it limiteth the Crown to them successively and the Heirs of their respective Bodies, in preference to all the other Issue of *Henry* the Seventh.

IT cannot be denied, that the Legitimacy of each of the Princesses was liable to some Dispute. I think it impossible to support the Legitimacy of both: though some Writers from a Zeal for the lineal Succession have attempted it.

1. Mar. Seff.
2. c. 1.

QUEEN *Mary* was advised to get all the Acts which stood in the Way of her Legitimacy repealed, as far as concerned *herself*; and the Marriage of her Father and Mother declared valid, the Sentence of Divorce a Nullity, and herself the Legitimate Issue of the King. But *Elizabeth* took a wiser Course. She had full Possession and a clear Title under a Parliamentary Settlement; and wisely resting on that, she suffered all Altercation about the Marriage of her Father and Mother, and the Divorce grounded on a supposed Pre-contract on her Mother's part, to sink into perpetual Oblivion.

1. Eliz. c. 3.

I think I am warranted, even by the Act for recognizing her Title, in saying, that she *rested on her Parliamentary Title*. For, the peculiar Circumstances of her Case considered, a bare Recognition in general Terms of her Right and Descent from the *Blood Royal*, unless the Act had been more explicit, amounted, in my Opinion, to no more than a Ceremonious, but cold Compliment to the Throne. It is true, the Act doth declare her to be as
fully

fully intitled as her Father or Brother. This may be so, since in the Judgment of Parliament she had as good, though possibly not the *same* Title they had. It goeth on and declareth her as fully intitled as her Sister. She certainly was. But how doth that matter stand upon the Foot of this Act? the Queen is declared to be as fully intitled as her Sister was at any Time *since the Statute of the 35th Year of King Henry the 8th*, the Act of Settlement already cited. This Declaration so guarded and limited, seemeth strongly to imply, either that in the Judgment of Parliament Queen *Mary* had no Title antecedent to that Act, or that *Elizabeth* having no other, it was thought but decent to put the Sister's upon an equal Foot, as former Parliaments had done.

THESE Things, together with the Care taken to corroborate the Act of Settlement by a fresh Confirmation of it, though the Statute of *Edward* the 6th before cited had strongly inforced it; and an express Repeal and Abrogation "of all Judgments and Decrees by whatsoever Power or Authority given, and of every Clause, See the Act. Matter, or Thing in any Act or Acts of Parliament repugnant to it," these Things, I say, shew, that whatever other Title the Queen might be presumed to have, her Title under the Act of Settlement had plainly the Preference. And in Fact, upon the first Notice of her Sister's Death she was by Order of the House of Peers then sitting, proclaimed true and lawful Heir to the Crown, according to the Act of Succession of the 35th Year of Henry the 8th. Camden.

THE Act for Recognizing the Title of her Successor, 1. Jac. 1. c. 1. penned in a Strain of Adulation suited to his Taste, after mentioning the happy Union of the Houses of York and Lancaster, carrieth his Pedigree back to *Elizabeth* the eldest Daughter of *Edward* the 4th, Wife of *Henry* the 7th; and is totally silent with Regard to the Entail on *Henry* the 7th and his Issue; by which, as I before observed, *Elizabeth* herself and the whole House of York were excluded. But it is observable, that the Tender of Perpetual Loyalty, Faith and Obedience, which the Parliament in Terms of deep Humility, "even upon the Knees of their Hearts," make to him, is carried no farther than to his own Person and his Royal Progeny and Posterity for ever; in other Words

See the Act.

Words of less Sound but equal Import, *the Heirs of his Body*. This is very consistent with the Entail on *Henry* the 7th and his Issue; and taketh in the whole Extent of the King's Title as founded on that Entail. But seemeth to be far short of a Title derived either from the House of *York* or *Lancaster*, or from the Union of both.

THE Powers delegated to *Henry* the 8th by the Statutes I have cited, favour, it must be confessed, very strongly of the *Temper of the Times*. But still they imply a full Conviction of the Truth of the Principles I have laid down. For the Legislature, in order to give to the King's Nomination the utmost Stability the Constitution will admit of, declareth that the King's Nominees shall hold and enjoy in like manner as if they had been *lawful Heirs to the Crown*; "or as if the Crown had been given and limited to them by *Name by the full and immediate Authority of Parliament*."

THE Law of *England* knoweth of no Title to the Crown, except Right of Blood, or the Designation of Parliament. These Titles are well known: and accordingly these Acts give to the King's Nominees the Strength and Security of both. Let me add, that the full and immediate Authority of the Legislature in the Matter of the Succession must have been presupposed as a Matter past all Dispute. Otherwise a Delegation of that Authority would have been no better than an idle, vain and ineffectual Parade; an Insult upon common Sense, and an Affront to the King himself.

THE Principles I have endeavoured to collect by *Implication* and *necessary Supposal* from the Acts already cited, are plainly and expressly established by the Statute
 13. Eliz. c. 1. of the 13th of *Queen Elizabeth*. Which enacteth among other Things, that if any Person, during the Life of the Queen, shall maintain or affirm, "that the
 " *Common-Law of the Realm*, NOT ALTERED BY
 " PARLIAMENT, ought not to direct the Right of
 " the Crown of *England*, or that the Queen with the
 " Authority of Parliament is not able to make Laws of
 " sufficient Force to limit and bind the Crown, and
 " the Descent, Limitation, Inheritance, and Govern-
 " ment thereof, every Person so maintaining and affirm-
 " ing shall be deemed a Traitor, and shall suffer
 " and

“ and forfeit as in Cases of High Treason. And every
 “ Person so maintaining and affirming *after the Queen's*
 “ *Decease* shall forfeit all his Goods and Chattles.”

It likewise enacteth, “ that whoever during the Life
 “ of the Queen shall by Writing or Printing declare, *be-*
 “ *fore it be so established and affirmed by Act of Parlia-*
 “ *ment*, that any Person in Particular, except the Issue
 “ of her Majesty, is or ought to be right Heir or Suc-
 “ cessor to the Queen, shall for the first Offence suffer
 “ Imprisonment for one Year, and forfeit one Half of
 “ his Goods: and for the second Offence, shall incur
 “ the Pains and Penalties inflicted by the Statutes of Pro-
 “ vision and Præmunire.”*

THE Clause of this Act first cited needeth no Com-
 ment. The other sheweth that the eventual Right of
 any Individual, though grounded on Common or Statute-
 Law, was judged a Question too big for ordinary Discus-
 sion, and proper only for the Discussion of the Legisla-
 ture.

THAT Part of the first Clause which regardeth the
 Power of Parliament in the matter of the Succession was
 in Substance revived and re-enacted twice in the Time of
 the late Queen. 4. An. c. 8.
6. An. c. 7.

BUT I pass over all the Acts touching the Succession
 made at or since the Revolution, which are well known.
 My Intention in what I have now submitted to the Judg-
 ment and Candour of the Reader was to shew, that the
 Powers happily carried into Execution by those Acts,
 have their Foundation in the Reason of Things, in the
 Nature of Government, and in the Principles of our
 Constitution.

It may possibly be objected, that the Statutes I have
 cited are no Evidence of a *Right*, they prove nothing more
 than Facts. Parliaments it may be said, have acted under
 an undue Influence: the Power of the Crown hath over-
 awed them, or the Spirit of Faction hath misled them.
 This may be true in some Instances; and were it so in
 more, my Argument would not in the least be affected
 by it. The Statutes I have cited prove a long Usage, an Uni-

* The printed Statutes I have cited on this Subject are not, as
 I remember, inserted at large in any Collection of the Statutes
 since *Rastal's* 1618.

DISCOURSE IV.

formity in Principle and Practice for many Ages back. This I conceive to be a proper Evidence of a constitutional Right. Because many of our constitutional Rights are capable of no other, and were never thought to stand in need of any other. And it is no Objection to any constitutional Powers, that those with whom they have been lodged have sometimes acted under an undue Influence.

FOR if the Gentlemen who make the Objection in the present Case, will be pleased to apply it to the Case of Parliamentary Aids, or any other Act of Legislation, or even to the known Prerogatives of the Crown, which stand upon the same Foot of long Usage, they will soon be convinced of the Weaknesses of it.

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